

San Francisco Law Library

No.

Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

857
850
No. 2345

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. MURRAY, Doing Business Under the
Name and Style of THE POCA TELLO
WATER COMPANY,

Appellant,

vs.

THE CITY OF POCA TELLO, a Municipal Corpo-
ration,


Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.

FILED

DEC 31 1913



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

Records of U.S. Circuit Court
appeals 851

No. 2345

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. MURRAY, Doing Business Under the
Name and Style of THE POCATELLO
WATER COMPANY,

Appellant,

vs.

THE CITY OF POCATELLO, a Municipal Corpo-
ration,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Bill of Complaint	1
Answer to Amended Bill of Complaint.....	22
Assignment of Errors	429
Bond on Appeal	434
Certificate of Clerk U. S. District Court to Transcript of Record.....	440
Citation	438
Decree	123
DEPOSITION ON BEHALF OF COM- PLAINANT:	
BISTLINE, J. M.....	222
Cross-examination	225
Redirect Examination	227
EXHIBITS:	
Exhibit "A" to Amended Bill of Com- plaint—Ordinance Number 86.....	14
Exhibit "A" to Answer to Amended Bill of Complaint—Ordinance Number 46....	49
Exhibit "B" to Answer to Amended Bill of Complaint—Ordinance Number 55...	53
Exhibit "C" to Answer to Amended Bill of Complaint—Bill of Complaint in City of Pocatello, etc. vs. Murray, etc.....	58

Index.

Page

EXHIBITS—Continued:

Exhibit "D" to Answer to Amended Bill of Complaint—Demurrer to Bill of Complaint in City of Pocatello, etc. vs. Murray, etc.....	71
Exhibit "E" to Answer to Amended Bill of Complaint—Order Sustaining Demurrer to Bill of Complaint in City of Pocatello, etc., vs. Murray, etc.....	74
Exhibit "F" to Answer to Amended Bill of Complaint—Opinion in City of Pocatello, etc., vs. Murray, etc.....	75
Complainant's Exhibit No. 2—Letter Dated July 26, 1907, Fire and Water Committee to Pocatello Water Co.....	141
Complainant's Exhibit No. 3—Minutes of Meeting of City Council of City of Pocatello, Dated October 15, 1907.....	334
Complainant's Exhibit No. 4—Letter, Dated October 17, 1907, Pocatello Water Co. to Mayor and City Council of Pocatello, Idaho.....	337
Complainant's Exhibit No. 5—Ordinance of City of Pocatello, Dated — day of November, 1907	339
Complainant's Exhibit No. 6—Letter, Dated June 10, 1908, George Winter to Mayor and City Council of Pocatello, Idaho..	341
Complainant's Exhibit No. 6 $\frac{1}{2}$ —Ordinance of City Council of Pocatello, Idaho,	

Index.

Page

EXHIBITS—Continued:

Granting Franchise to James A. Murray, etc.....	342
Complainant's Exhibit No. 7—Letter (Unsigned), Dated May 25, 1908, to George Winter, Superintendent Pocatello Water Co.....	357
Complainant's Exhibit No. 8—Ordinance No. 180 of City Council of City of Pocatello	362
Complainant's Exhibit No. 10—Letter, Dated August —, 1905, George Winter, Superintendent Pocatello Water Works, to Walter H. Cleare, Mayor of City of Pocatello	377
Complainant's Exhibit No. 14—Letter, Dated August 2, 1911, George E. Hyde, M. D., President Idaho State Board of Health, etc., and James H. Wallis, Idaho State Food and Sanitary Inspector to Mayor and City Council of Pocatello, Idaho	401
Complainant's Exhibit No. 15—Excerpt from Pocatello "Tribune" of September 7, 1910	404
Complainant's Exhibit No. 23—Amended Rules of Pocatello Water Co., Governing the Use of Water.....	411
Defendants' Exhibit No. 1—Letter, Dated October 3, 1907, D. Worth Clark to Fire	

	Index.	Page
EXHIBITS—Continued:		
and Water Committee and City Council of City of Pocatello, Idaho.....		294
Defendants' Exhibit No. 2—Letter, Dated July 29, 1911, City Engineer to Fire and Water Committee of City Council of Pocatello, Idaho		414
Defendants' Exhibit No. 54—Notice to Water Users of Pocatello Water Co., Dated July 8, 1911.....		418
Defendants' Exhibit No. 55—Notice to Pat- rons of Pocatello Water Co., Dated July 26, 1912		421
Names and Addresses of Counsel		1
Notice of Lodgment of Statement on Appeal..		426
Opinion		85
Order Settling and Approving Statement of Evidence, etc.....		425
Petition for Appeal.....		427
Praeipe to Clerk for Transcript on Appeal....		436
Replication		84
Return to Record		439
Statement of Evidence on Appeal.....		125
TESTIMONY ON BEHALF OF COMPLAIN- ANT:		
ASHTON, WILLIAM.....		134
Cross-examination....		135
Redirect Examination		136
Recross-examination....		137
Recalled.....		160

	Index.	Page
TESTIMONY ON BEHALF OF COMPLAIN-		
ANT—Continued:		
Cross-examination.....		161
Redirect Examination.....		161
BELL, O. J.....		196
BERG, FINN H.....		171
Recalled.....		210
BURRUS, FLETCHER R.....		200
Cross-examination.....		202
CHURCH, D. W.....		220
CLEARE, WILLIAM M.....		164
Cross-examination.....		166
Redirect Examination.....		167
Recross-examination.....		168
Recalled in Rebuttal.....		333
COLLINS, H. A.....		195
Cross-examination.....		195
DICE, F. W.....		188
Cross-examination.....		188
DOTY, HORACE W.....		204
Cross-examination.....		205
FARGO, LYMAN.....		231
Cross-examination.....		231
GARBETT, SAMUEL G. (in Rebuttal)...		331
Cross-examination.....		332
GITTINS, GEORGE.....		229
HAVENOR, W. P.....		161
Recalled.....		178
Cross-examination.....		181
Redirect Examination.....		185
Recross-examination.....		185

	Index.	Page
TESTIMONY ON BEHALF OF COMPLAIN-		
ANT—Continued:		
HIGSON, HENRY K.....		169
Cross-examination....		170
Recalled		173
Cross-examination....		174
Redirect Examination..		174
LOUX, C. E. M.....		174
Cross-examination....		177
Redirect Examination....		177
MARTIN, T. C.....		191
Cross-examination....		193
Redirect Examination.....		194
Recross-examination....		194
McMAHON, JOHN.....		205
Cross-examination		206
Redirect Examination		206
Recross-examination.....		206
MOORE, W. E.....		126
Cross-examination.....		129
Redirect Examination..		133
POTTER, EUGENE A. (in Rebuttal)....		332
REYNOLDS, J. C.....		152
Cross-examination		152
Redirect Examination.....		154
STANDLEY, J. A.....		232
Cross-examination....		233
Redirect Examination....		235
STOKER, BERT..		228
TERRELL, THOMAS F.....		137

Index.

Page

TESTIMONY ON BEHALF OF COMPLAIN-

ANT—Continued:

TOWNSEND, J. H.....	189
Cross-examination.....	190
TRAPP, W. E.....	196
Cross-examination.....	197
TURNER, THEODORE.....	155
Cross-examination.....	158
Redirect Examination.....	158
Recross-examination.....	159
Recalled in Rebuttal.....	329
Cross-examination.....	330
WEIDEMAN, FRED.....	207
Cross-examination..	208
Redirect Examination.....	209
Recross-examination.....	209
WHITE, E. C.....	198
Cross-examination.....	199
WILSON, R. M.....	221
Cross-examination.....	221

TESTIMONY ON BEHALF OF DEFEND-
ANTS:

BEAN, A. B.....	249
Cross-examination	250
ELLIOTT, G. A.....	319
Cross-examination	324
Redirect Examination	328
Recross-examination	328
FRANKLIN, N. G.....	243
Cross-examination	243
Redirect Examination	244

Index.	Page
TESTIMONY ON BEHALF OF DEFEND-	
ANTS—Continued:	
GREEN, GEORGE A.....	250
Cross-examination	255
Redirect Examination	257
Recross-examination	257
Recalled	269
Cross-examination	269
HAYES, R. J.....	242
Cross-examination	242
LEONARD, F. O.....	235
Cross-examination	240
MARSTON, EDGAR L.....	246
Cross-examination	246
Redirect Examination	246
Recross-examination.. ..	247
MEYERS, H. C.....	241
Recalled.....	245
Cross-examination.....	245
Recalled.....	249
Cross-examination.....	249
MOORE, W. E.....	313
Cross-examination... ..	316
Redirect Examination.....	317
Recross-examination... ..	318
Redirect Examination.....	319
MURRAY, ALECK.....	283
Cross-examination.....	283
Redirect Examination....	285

TESTIMONY ON BEHALF OF DEFEND-
ANTS—Continued:

TEEPLÉ, A. R.....	309
Cross-examination.....	309
Redirect Examination	312
WINTER, GEORGE.....	258
Recalled.....	270
Recalled.....	285
Cross-examination....	297

[Names and Addresses of Counsel.]

N. M. RUICK, Esq.,

JAMES H. HAWLEY, Esq.,

Boise, Idaho,

Attorneys for Plaintiffs in Error.

W. H. WITTY, City Attorney,

D. WORTH CLARK, Esq.,

Pocatello, Idaho,

Attorneys for Defendant in Error.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCATELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCATELLO WATER
COMPANY, and GEORGE WINTER,
Defendants.

Amended Bill of Complaint.

To the Honorable Judge of the District Court of the
United States, in and for the District of Idaho,
Eastern Division:

Comes now the plaintiff, City of Pocatello, and by
leave of the Court first had and obtained, files this
its amended complaint herein and alleges:

I.

That the plaintiff, City of Pocatello, now is and
during all the times herein mentioned, was a muni-
cipal corporation and a city of the second class duly

organized and existing under and by virtue of and pursuant to the laws of the State of Idaho, the limits and boundaries of said city embracing certain lands in the County of Bannock, State of Idaho.

II.

The defendant above named, James A. Murray, is a citizen of the State of Montana, and customarily resides at Butte City in the County of Silver Bow, in the State of Montana; and the defendant, George Winter, is the manager of [1*] the waterworks system hereinafter described, and is in the complete and absolute control of the same at Pocatello, Bannock County, Idaho.

III.

That at the dates and times mentioned in this complaint, defendant, James A. Murray, was and now is doing business in said City of Pocatello in conducting a waterworks plant and water system for the purpose of furnishing the citizens of Pocatello a pure and adequate supply of water for domestic uses and lawn purposes, said business being conducted under the name and style of POCA-TELLO WATER COMPANY.

IV.

That on the 6th day of June, 1901, the City of Pocatello passed in due form, and the Mayor thereof approved an Ordinance No. 86, whereby the plaintiff granted unto said defendant, James A. Murray, his successors and assigns, the right, privilege, power and authority to construct, operate, hold, own and maintain within the corporate limits of the

*Page number appearing at foot of page of original certified Record.

City of Pocatello, a full and complete system of waterworks for the supplying of the said City of Pocatello, and the inhabitants thereof with a sufficient and adequate supply of pure and healthful water, said ordinance providing that the water supply should be sufficient to supply both the private and public uses and purposes of the citizens and inhabitants of the City of Pocatello, and that the pressure maintained for fire purposes should be at least 150 feet perpendicular fall, a copy of which said ordinance is hereto attached marked Exhibit "A" and made a part hereof. [2]

V.

The defendant, James A. Murray, immediately upon the passage and approval of said Ordinance No. 86, accepted the same and the franchise granted thereunder, and by virtue of the privileges thereof has at all times since said time been operating at Pocatello, Bannock County, Idaho, said waterworks and system.

VI.

That said waterworks system so constructed and operated by said James A. Murray conveys water from two small mountain streams known as Gibson Jack Creek and Mink Creek, which is the only source of supply for the furnishing of water to the citizens of Pocatello for lawn irrigation and domestic purposes; that said water system and plant consists among other things of a line or lines of pipe conveying water from said mountain streams to a series of reservoirs, and therefrom the water is conveyed through pipes and mains to the said City of Poca-

tello, and over, through and under the streets and alleys thereof for the supplying of the inhabitants of said city with water for domestic purposes and for lawn irrigation, and other uses, and the City of Pocatello uses the waters for the extinguishment of fires and for the sprinkling of its streets.

VII.

That it is provided in said Ordinance that the City of Pocatello in consideration of the improvements to said water system to be made by said Murray, as provided in said Ordinance, shall rent, receive and pay for not less than 45 fire hydrants at the schedule rate named in said Ordinance, and thereafter hydrants in the number of 53 were installed by the plaintiff for use by the City of Pocatello.

VIII.

Plaintiff alleges that on said 6th day of June, 1901, this plaintiff acting by and through its City Council [3] and mayor duly passed and approved said Ordinance No. 86, a copy of which is attached hereto marked Exhibit "A," and made a part hereof, said defendant being granted the rights and privileges therein specified upon certain conditions therein contained; that at the time said Ordinance was passed, as aforesaid, and as a condition upon which the same was granted, the defendant by reason of the inadequacy of the water supply furnished to said City of Pocatello and its inhabitants agreed to bring into said system as additional to the waters then supplied, the waters of a creek commonly known as Mink Creek, and make all extensions of street mains warranted by the growth of said City, and it was

provided in said Ordinance by Section 6 thereof as follows, to wit:

“Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.”

IX.

This plaintiff further alleges that the defendant James A. Murray, violated the agreement as contained in said Ordinance by failing to bring in the waters of said Mink Creek, and by failing to make the necessary extensions of street mains warranted by the growth of the City of Pocatello and said defendant has not at any time since the passage of this ordinance up to the present time diverted into his said water system the waters of said Mink Creek, or any part thereof in excess of 46/100 of one second-foot per second of time, notwithstanding that during the low-water season of each and every year since the passage of said Ordinance, there has been [4] flowing in said Mink Creek at the point where defendant diverts said 46/100 foot of water per second of time; more than 3½ second-feet of water per sec-

ond of time; and plaintiff further alleges that by reason of the defective condition of the pipes by and through which said 46/100 of a second-foot of water per second of time of said Mink Creek is so diverted by defendant and should be conveyed and conducted to defendant's reservoirs, large quantities of said water are lost by leakage and do not reach said reservoirs, and are not furnished to the plaintiff or the inhabitants thereof.

X.

Plaintiff further alleges that at all times herein mentioned it has obtained all of its water for sprinkling purposes, and fire purposes from said water system, and that defendant not having complied with his agreement, or with the terms of said Ordinance No. 86 by bringing in the waters of said Mink Creek, and the growth of the town, and the enlargement of the irrigation area, and the enlargement of the sprinkling district requiring a greater quantity of water than had theretofore been necessary in order, as plaintiff is informed and believes and so charges the fact to be, to avoid the necessity of incurring a sufficient expenditure to bring in the waters of said Mink Creek, and to repair his water system so that said water would not be lost in being conveyed from said Creek to his reservoirs, promulgated rules and regulations restricting the use of water by the city and the inhabitants thereof during the summer months to such an extent as to prevent the said city from keeping its streets sprinkled and so as to prevent the inhabitants of said city from obtaining sufficient water for culinary and domestic purposes, or

for lawn [5] sprinkling, and during the months of June, July, August and September in each and every season for many years past the city and the inhabitants thereof have suffered great inconvenience and annoyance, and the health of the inhabitants of said city has been jeopardized and property rendered liable to loss by fire by reason of the neglect and wrongful conduct of the defendant in failing to bring in the waters of said Mink Creek, and by reason of defendant's conduct through his agents and employees in promulgating and establishing unreasonable rules and restrictions concerning the use of water, that during the months of July, August and September of 1910 and 1911, and during the same months in the preceding years, defendant has on occasions and for long periods of time by his rules and regulations limited the use of water for lawn sprinkling to a period of time insufficient for such purpose, whereby and by reason whereof the lawns through the city, and the shade trees suffered severely for the want of water, and early in the month of August for many years last past the leaves dropped off the shade trees in said city, and lawns became dried up and burnt, and placed reducers in the standpipes used by the plaintiff for the purpose of obtaining water for street sprinkling, so that plaintiff was deprived of a sufficient amount for that purpose and to which it was entitled under the provisions of said ordinance; that by reason of defendant's neglect to bring in the waters of said Mink Creek the supply of water for said water system was so depleted during the summer of 1911 that defendant's reservoirs

became empty and this plaintiff and its inhabitants were for more than one month practically without any water supply for any purpose whatsoever, and this plaintiff through its contractors and servants was obliged to and did pump water from the Portneuf River flowing through said city, the water of said river, however, being unfit for domestic uses, and did obtain water also from irrigation [6] ditches in order to sprinkle certain of its principal thoroughfares, thereby incurring great expense and causing great inconvenience and annoyance.

XI.

That the defendant in addition to his neglect to bring in the waters of Mink Creek, as aforesaid, and his promulgation of unreasonable rules and restrictions concerning the use of water, as alleged, in order to avoid the expense of laying pipes to bring in the waters of Mink Creek, and to otherwise improve said water system to meet the needs of this plaintiff and the inhabitants thereof, has inserted and caused to be inserted in the pipes leading to the private residences and business houses, and still maintains in said pipes contrivances known as "Reducers," and has otherwise tampered with said pipes so as to obstruct the free flow of water through the same, whereby the inhabitants of the city during the summer months of each and every year are not furnished with sufficient supply of water for culinary and domestic purposes, or for lawn sprinkling, and have therefore and thereby suffered great annoyance and inconvenience, and the health of said people and the property of said city has been and is during said

periods thereby jeopardized; and plaintiff is informed and believes, and so charges the fact to be, that all of said acts of defendant through his agents and employees in establishing rules restricting the use of water and in interfering with the free flow of water through the pipes of said system, and through pipes leading to private residences and business houses, have been committed and performed for the purpose of avoiding the expense necessary to be incurred to bring in the waters of Mink Creek in accordance with the agreement of the plaintiff as set forth in said Ordinance No. 86, and with the object of compelling this plaintiff and the inhabitants thereof to get along with such supply of water as defendant [7] feels disposed to furnish without regard as to whether the time is sufficient or insufficient.

XII.

That during all of said years and at the present time the citizens of the City of Pocatello have paid when due all water rates and charges made by said James A. Murray as provided in said Ordinance marked Exhibit "A," although said schedule of rates and charges set forth in said Ordinance No. 86 is unreasonable, unjust, inequitable and oppressive, and plaintiff has frequently demanded of the defendant that said rates be adjusted so that an equitable rate be charged and collected, which said defendant has at all times refused and still refuses to do.

XIII.

That said defendant, George Winter, mentally conceives the idea that he is the enemy of the citizens

of the City of Pocatello, and resorts to outrageous ways of venting his spite and spleen against the citizens to such an extent that upon various occasions the water has been shut off from the city and its inhabitants without warning, and without any necessity existing therefor, and the city has at times been deprived of water entirely, and of adequate fire protection, and thereby the lives and property of the citizens of the city endangered; that said George Winter also refuses to attempt to make any provision whatever to store water so that the city may be protected in case of fire; that the weather is now dry and hot and all of the property situated within the limits of the City of Pocatello is in imminent danger of being destroyed by fire, and the citizens have no adequate supply of water for domestic uses, and the city has no water [8] for street sprinkling except that obtained from other sources.

XIV.

Plaintiff alleges according to its information and belief that defendant George Winter during the last municipal campaign was violently opposed to the election of any of the present city officers, and at that time made threats openly and publicly that if any of said officers were elected he would cause the citizens trouble; that pursuant to said threats and for the purpose of venting his spite and ill-feelings, and for no other purpose, said George Winter, according to the plaintiff's information and belief, has deliberately caused the storage reservoirs containing the only available supply of water for the needs of the city and to protect it against damage by fire to be

emptied, thereby leaving the city without fire protection. That in addition thereto said George Winter has upon occasions, deliberately and maliciously, and at times when the most inconvenience would be suffered by the citizens of Pocatello and without notice, shut off the water service, and now threatens that if the city goes into court to protect and maintain its rights that he will cause all of the water supply for Pocatello to be turned into the Portneuf River and deprive the citizens of Pocatello from water entirely.

XV.

That said George Winter is now engaged in running and conducting the Pocatello Water system for the sole and only purpose of causing the City of Pocatello and its inhabitants all the annoyance and inconvenience possible, and without [9] due or any regard to the rights of its citizens and openly threatens that the worst is yet to come, and that he has only just begun in his campaign of vengeance, malice, ill-will and hatred.

XVI.

That the city at present has no other way of obtaining water for the use of itself and its inhabitants, and it is the information and belief of this affiant that if some competent person were placed in charge of said water system temporarily, that the lives and property of the citizens of Pocatello could be saved that are now endangered by virtue of the insane and unreasoning attitude assumed by said George Winter, the superintendent of said waterworks system. That said James A. Murray is out of the State and

cannot be reached, and for that reason it is useless to make any appeal to him.

XVII.

That plaintiff believes that unless restrained by an order of this Court, said defendant George Winter will put his threats heretofore made into execution and will deprive the City of Pocatello and its inhabitants of water by shutting the source off and wasting it and turning it into the Portneuf River, and committing other unlawful and malicious acts, thereby depriving said city and its inhabitants of adequate fire protection and of water for domestic and other uses.

Plaintiff therefore states that it has no plain, speedy or adequate remedy at law, or any other adequate or sufficient remedy in equity, and therefore prays this Court to appoint a temporary receiver or representative of this Court to take charge of said waterworks system, and to operate the same under the orders and directions of this Court [10] until such time as the condition now existing may be relieved for the purpose of protecting the lives and property of the inhabitants of the city.

That defendants be enjoined from shutting off the supply of water to plaintiff and its inhabitants as threatened; that they be enjoined from conducting or running any water into the Portneuf River, or doing any act that will in any way injure the said water supply or system or deprive said city and its inhabitants of water, and from in any way interfering with the free and uninterrupted flow of water to and through the pipes, reservoirs and mains now owned

and operated by them to the City of Pocatello to the extent of the capacity of said plant, except the same be done under and pursuant to the order and direction of this Court and for the purpose of promoting public safety.

Plaintiff further prays that the contract and franchise ordinance under which said defendant is operating and heretofore referred to be cancelled, annulled, and held for naught, and that plaintiff be relieved from all obligations thereunder, and that plaintiff have such other and further relief as to this Court shall seem proper and agreeable to equity.

Answer under oath is hereby waived.

Plaintiff prays for its costs of suit herein incurred.

P. C. O'MALLEY,
CLARK & BUDGE,
Attorneys for Plaintiff,
Residence: Pocatello, Idaho. [11]

State of Idaho,
County of Bannock—ss.

J. M. Bistline, being first duly sworn, deposes and says: That he is mayor of the City of Pocatello, and makes this verification for and in its behalf; that he has read the above and foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be upon information or belief, and as to those matters he believes it to be true.

J. M. BISTLINE.

Subscribed and sworn to before me this 16th day of July, 1912.

[Notary Seal]

P. C. O'MALLEY,
Notary Public [12]

Exhibit "A" [to Amended Bill of Complaint].

ORDINANCE NO. 86.

An ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray for supplying said city with water for public and private use; fixing the rates to be charged for said water; providing a means of ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of a sale; and waiving the right on the part of said city to build, own or acquire a competitive water system, except under stated conditions or of granting to others more favorable terms or franchises than that now held and granted to said James A. Murray.

PREAMBLE.

Whereas, the town or village of Pocatello, on the 4th day of January, 1892, conferred and granted to F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right, authority and permission to construct, maintain and operate an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the

town or village of Pocatello for a period of fifty (50) years, for the purpose of laying along, over and under said streets, alleys and public highways, water mains, pipes and conduits for the purpose of furnishing and supplying the said town or [13] village of Pocatello, and the inhabitants thereof with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant; and,

Whereas, the said F. D. Toms, John J. Cusick and James A. Murray, and their associates, successors and assigns, fully complied with said condition precedent, and obtained vested rights under said grant; and,

Whereas, the City of Pocatello, is a city of the second class and is the legal municipal successor of the said town or village of Pocatello; and,

Whereas, a commissioner duly appointed and constituted, did on or about the first day of September, 1896, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, then owner and holder of said privileges and franchises, for both public and private uses, which said rates were confirmed and continued by the provisions of Ordinance No. 56, approved June 8th, A. D. 1898; and,

Whereas, the rates and charges so fixed and continued are now deeded and considered to be fair, equitable, reasonable and just, and will continue to be fair, equitable, reasonable and just, in the near future; and,

Whereas, the said James A. Murray has succeeded to and is now the owner and holder of all property

of whatever kind and nature formerly owned or held by said Pocatello Water Company, including said water system complete, and all rights, privileges and franchises appurtenant thereto, or used therewith, and,

Whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink Creek, and to make all extensions of street mains warranted by the growth of said city, thereby [14] necessitating the laying of several miles of pipe at a large additional expenditure of money; and,

Whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe-line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and,

Whereas, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the City of Pocatello, to extend and give the assurance asked for;

Now, therefore, be it ordained by the Mayor and Council of the City of Pocatello;

Section 1. That the privileges and franchises originally given, granted and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, as recited in Pocatello Town or Village Ordinance No. 46, passed

and approved January 4th, 1892, are hereby ratified, continued and confirmed unto James A. Murray, and to his successors and assigns according to the terms of said original grant, he, the said James A. Murray, being the legal successor of the said F. D. Toms, John J. Cusick and James A. Murray, therein named.

Section 2. The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the Pocatello Water Company, to the City of Pocatello, and the inhabitants thereof heretofore fixed and adopted by the commission duly appointed and constituted, whose report was received, filed and adopted on or about the [15] first day of September, 1896, and now in full force and effect within the said City of Pocatello, is hereby declared to be fair, equitable, reasonable and just, and shall hereafter continue to be the schedule of rates and charges for water service by the said James A. Murray, for both public and private uses, except as hereinafter stated, to wit:

(Schedule of Water Rates omitted because the same is in the Statement of facts herein.)

Provided, that in cases where consumers are paying for either residence or lawn sprinkling privileges no charge shall be made for one horse or cow, and where consumers are paying for both lawn and residence privileges no charge shall be made for one horse and one cow or for two horses or two cows.

Section 3. The foregoing rates and charges are hereby adopted by the City of Pocatello, by and for itself, and as trustees for the use and benefit of all private consumers of water within the corporate lim-

its of said city for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water system shall exceed five per cent above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the "Schedule of Water Rates" of Section Two of this Ordinance may be readjusted so as to yield not less than five per cent above reasonable expenses on the valuation, but no readjustment shall hereafter be made that will yield less than five per cent above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in Section Four.

Section 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section three, and if the [16] City of Pocatello and the said James A. Murray, or his successors or assigns cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained and determined in the following manner, to wit:

A committee of four experienced and disinterested hydraulic engineers who must be members of the American Society of Civil Engineers, shall be selected, two by the city of Pocatello, and two by said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the

four cannot agree they shall select a fifth, and if they cannot agree upon a fifth, they shall request the President of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates and such decision shall be final.

Section 5. The City of Pocatello shall not hereafter grant to an individual, corporation or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held, confirmed and continued in said James A. Murray; nor shall the city of Pocatello, build, acquire, own or operate a water system of its own, until it has in good faith offered to purchase the water system of the said James A. Murray, or his successors or assigns, at a price to be ascertained as follows: If the owners of said water system and the City of Pocatello cannot agree upon the price then a committee of experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers shall be selected in the manner set forth in section four of this ordinance, who shall fix the value of said water system for the purpose of such sale, and the decision of a majority [17] of such committee shall be final.

At intervals of five years from the approval of this ordinance and during the period of ninety days, immediately following the completion of each five year interval, the city may purchase the water system of the said James A. Murray or his successor or assigns,

under the conditions specified in this section, but at no other time except by mutual consent of the city and the owner of said water system.

In fixing the value of said water system whether for the purpose of selling or of readjusting rates, the water system of the said James A. Murray, or his successor or assigns, shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, offices, barns, appliances, machines, tools, implements, storage grounds, material on hand, and all rights and property of what kind soever, either in use or on hand and belonging to the said James A. Murray, in his capacity of furnishing water for any and all purposes to himself and to his customers, at Pocatello, Idaho, saving and excepting account books, and records; and each article of property aforesaid shall be separately considered and evaluated by said committee and in the event of the City of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said city, and the said city shall receive and pay for the whole plant as aforesaid, the said James A. Murray stepping out, and leaving all said property undisturbed and ready for the city to step in.

Section 6. Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements [18] mentioned in the preamble hereto, and shall carry the same to effective

and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.

Section 7. That in consideration of the improvements named in this ordinance, the City of Pocatello hereby agrees to rent, receive and pay for, not less than forty-five (45) fire hydrants, at the schedule rate named in section 2 hereof; and within ninety days after the passage and approval of this ordinance to designate points on the water mains at which the extra hydrants shall be placed as soon as may be, the hydrants to be subject to rental from and after the date of their being placed in position.

Section 8. If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the City of Pocatello and the inhabitants thereof, then it shall be optional with the City of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provision of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply.

Section 9. All ordinances or parts of ordinances

in conflict herewith are hereby repealed.

Passed this 6th day of June, 1901.

T. O. SMITH,
City Clerk.

Approved this June 6th, 1901. [19]

THEO. TURNER,
Mayor.

[Endorsed]: Filed July 18, 1912. A. L. Richardson, Clerk. [20]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCA TELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY, and GEORGE WINTER,
Defendants.

Answer to Amended Bill of Complaint.

To the Honorable, the Judge of the District Court of
the United States in and for the District of
Idaho, Eastern Division.

This defendant, James A. Murray, doing business
under the name and style of Pocatello Water Com-
pany, now, and at all times hereafter saving to himself
all, and all manner of benefit or advantage of excep-
tion, or otherwise, that can or may be had, or taken
to the many errors, uncertainties and imperfections
in the amended bill of complaint herein contained,
for answer thereto, or so much thereof as this de-

fendant is advised it is material or necessary for him to make answer unto, answering, says:

First, this defendant admits the allegations, and each thereof, contained in paragraph first of said amended bill of complaint.

Second, this defendant admits the allegations, and each thereof, contained in paragraph second of said amended bill of complaint, except that this defendant denies that the defendant, George Winter, is in the complete and absolute control of the [21] waterworks system at Pocatello, Bannock County, Idaho, described in said amended bill of complaint.

Third, this defendant admits that he was at all times mentioned in the amended bill of complaint, and is now, doing business in said City of Pocatello, in conducting a waterworks plant and waterworks system therein, and alleges that said waterworks system is being so conducted and managed and operated by this defendant for the purpose of furnishing the citizens of Pocatello such a supply of water as this defendant is required to supply under and by virtue of the various ordinances and agreements between the said City of Pocatello and this defendant that are hereinafter in this answer set forth, and for the purposes specified in said ordinances and agreements, and alleges that this defendant is not conducting and operating, or maintaining such a waterworks plant and water system for any other purpose whatsoever than that therein specified. This defendant admits that on or about the 6th day of June, A. D. 1901, the City of Pocatello passed in due form, and amendatory thereof, and approved, an

ordinance numbered 86, referred to in paragraph No. 4 of said amended bill of complaint, a true copy of which said ordinance is attached as an exhibit to said complaint, and this defendant alleges that the terms of the said ordinance and the legal effect thereof are to be determined from a consideration of said ordinance in connection with other ordinances of the City of Pocatello, and the acts and things done and performed under all of said ordinances by the parties hereto, and certain records of judicial proceedings hereinafter set forth, and denies that said Ordinance No. 86, has any other or further force or effect, or imposes upon this defendant any other, or further, or different obligations, than will appear as a matter of law from a consideration of said Ordinance No. 86, and said other ordinances, and said acts and doings of said parties, and said records of judicial proceedings had between the plaintiff and this defendant as aforesaid. [22]

Fourth, this defendant admits that upon the passage and approval of the said Ordinance No. 86, this defendant accepted the same, and all rights and privileges accruing to him thereunder, but denies that this defendant has ever since the acceptance of the said ordinance, been operating the said water system at Pocatello, Bannock County, Idaho, solely by virtue of the privileges granted under said Ordinance No. 86, and alleges that he has, since the acceptance of said Ordinance No. 86, been operating and maintaining said waterworks system under and by virtue of the rights and privileges granted to him in and by all the ordinances, covenants, agreements, acts of

the parties, and records of judicial proceedings referred to in the preceding paragraph of this answer, and hereinafter more fully and in detail set forth.

Fifth, this defendant admits that said Waterworks system so constructed, maintained, and operated by this defendant conveys water from two small mountain streams known as Gibson Jack Creek and Mink Creek, and from another stream known as Cusick, but this defendant denies that said Gibson Jack Creek and Mink Creek are the only sources of supply available for the furnishing of water to the citizens of Pocatello, and alleges that said Gibson Jack Creek and Mink Creek and Cusick Creek offer the most available and economical sources of supply for the furnishing of water to the citizens of Pocatello for the purposes set forth in said ordinances. This defendant admits that said water system and plant consists among other things of a line or lines of pipe conveying water from said mountain streams to a series of reservoirs, and therefrom said water is conveyed through pipes and mains to the City of Pocatello, and over, through and under streets and alleys thereof, for the purpose of supplying the inhabitants of the said city with water for the purposes set forth in said ordinances, and as required by said [23] ordinances; and denies that said water system is constructed, maintained and operated for the purpose of supplying any water for any purpose, or in any other manner, or amount, than is specified and set forth in said ordinances.

Sixth, this defendant admits the allegations and each thereof contained in paragraph "VII" of said

amended bill of complaint.

Seventh, this defendant admits that on the sixth day of June, A. D. 1901, the plaintiff, acting by and through its city council, and mayor, duly passed and approved said Ordinance No. 86, and that the copy thereof attached to said amended bill of complaint and marked Exhibit "A" thereto, is a true and correct copy of said ordinance, and this defendant alleges that the rights, duties, privileges and obligations of the defendant, acquired or assumed under the provisions of the said ordinance, can be determined as a matter of law from the ordinances, agreements, acts of the parties, and judicial records hereinbefore referred to, and hereinafter specifically set forth, and that the privileges, rights, duties and obligations of this defendant were and are none other than will therein fully appear.

Eighth, this defendant denies that he is now violating, or has violated the, or any agreement, as contained in said Ordinance No. 86, or any other ordinances, or covenant, by failing to bring in the waters of said Mink Creek, or otherwise, or by failing to make the necessary extension of street mains warranted by the growth of the City of Pocatello, or otherwise, and defendant denies that he has not at any time since the passage of said Ordinance No. 86 up to the present time diverted into his said water system or any part of the waters of Mink Creek in excess of forty-six one-hundredths (.46) of one second-foot of water per second of time. Defendant denies that during the low-water seasons of each and every year since the passage of the said ordinance

there has been flowing in said Mink Creek at the point where this defendant diverts the water therefrom [24] for said system, or at any other point available for diversion, more than forty-six one-hundredths (.46) of one second-foot of water per second of time, and this defendant denies that the pipe through which this defendant diverts water from said Mink Creek into said reservoirs has been or is in a defective condition, and denies that large, or any, quantities of water diverted from Mink Creek by this defendant into said pipe are lost by leakage, and do not reach said reservoirs, and are not furnished by this defendant to the plaintiff, or its inhabitants. On the contrary, this defendant alleges that he has caused to be diverted from said Mink Creek and carried through good and sufficient pipes into said water system, and supplied to the plaintiff and its citizens all that part of the waters of Mink Creek that this defendant is now, or has been in any manner obligated to furnish to the plaintiff or its inhabitants, as will hereinafter be more fully and specifically alleged and set forth.

Ninth, this defendant admits that at all the times mentioned in the said amended bill of complaint, the plaintiff has not obtained all of its water for street sprinkling purposes and fire purposes from this defendant's water system, but this defendant denies that he has not complied with his agreements, or with the terms of said Ordinance No. 86, or any other agreement, or ordinance, or obligation, by bringing in the waters of Mink Creek, or otherwise. This defendant admits that he has from time to time caused

rules and regulations to be promulgated for the purpose of regulating the use of water by the City of Pocatello and the inhabitants thereof, during the summer and other months, but this defendant denies that such rules and regulations were intended to prevent, or were such as to prevent, or did prevent, said city from keeping its streets sprinkled, or the inhabitants thereof from obtaining sufficient water for culinary or domestic purposes, or for lawn sprinkling, and denies that the purpose of [25] promulgating such, or any, rules was to avoid sufficient, or any proper expenditure to bring in the waters of Mink Creek, or any other water, or to repair the defendant's water system. This defendant denies that during the months of June, July, August and September or any other month in each and every, or any, season, for many, or any, years past, the city, or the inhabitants thereof, or either of them, have suffered great, or any inconvenience, or annoyance, and denies that the health of the inhabitants of said city has been jeopardized, or that any property therein has been rendered liable by loss by fire by reason of the neglect and wrongful conduct, or the neglect or wrongful conduct, of this defendant in failing to bring in the waters of Mink Creek, or by reason of any other neglect, or conduct, of the defendant. This defendant denies that he has, through his agents, employees, or otherwise, promulgated and established unreasonable rules and restrictions concerning the use of water. This defendant denies that during the months of July, August and September, 1910 and 1911, or any other months of any other years he has, on occasions,

or for long periods of time, or at all, limited by rules, or regulations, or otherwise, the use of water for lawn sprinkling to a period of time insufficient for the said purpose, and denies that by reason of any act of the defendant, his agents, or employees, the, or any, lawns, or shade trees, throughout the City of Pocatello, suffered severely, or at all, for the want of water, and denies that by reason of the, or any, acts of the defendant, his agents, or employees, the leaves of shade trees in said city were caused to drop off in the month of August, or at any time, and denies that because of any acts of the defendant, his agents, or employees, the, or any, lawns in the City of Pocatello, became dried up or otherwise injured, and this defendant denies that by said alleged or any rules and regulations the time for sprinkling the streets of said city was so limited as not to afford sufficient time for the sufficient sprinkling of the said streets; and this [26] defendant denies that because of his neglect, or the neglect of his agents, or employees, to bring in the waters of Mink Creek, or any other neglect, the supply of water for said water system was so depleted during the summer of 1911, that its reservoirs became empty. And this defendant denies that because of any neglect of this defendant, his agents, or employees, said city and its inhabitants were practically, or at all, without any water supply for any purpose whatsoever. This defendant admits that the contractors and servants of the plaintiff did pump water from the Portneuf River, and from certain irrigation ditches in the summer of 1911 for the purpose of sprinkling certain of its principal streets, but this

defendant alleges that said city was not obliged so to do. This defendant further alleges that the summer of 1911 was unusually hot and dry, and the City of Pocatello and its environs was visited with an unusual drought; that, notwithstanding such fact, this defendant was ready, willing and able to supply the City of Pocatello and its inhabitants with a reasonable and adequate quantity of water for all reasonable and proper uses of the said city and the inhabitants thereof; that said city and the inhabitants thereof did wantonly and maliciously waste said water, and make an improper and excessive use thereof, and did not reasonably and properly apply the same to its and their proper and lawful uses and needs during the said period of time; that the said city falsely, wantonly and maliciously represented to the pure food inspector of the State of Idaho that the said water so furnished by this defendant was impure and polluted, and called upon said inspector to intervene, and thereupon said inspector inspected the source of supply and the system of this defendant, and advised this defendant that said supply of water was not impure, or polluted, but requested and required this defendant to clean his reservoirs; that thereupon an agreement was entered into between this defendant and said inspector that this defendant should empty and clean the said reservoirs for the said purpose; [27] that the cleaning of said reservoirs was wholly unnecessary, and that the same was occasioned by the wanton, malicious and unreasonable demands and requests of the plaintiff and its inhabitants; that in accordance with the said demands so brought about

and enforced, this defendant caused his said reservoirs, three in number, to be alternately emptied and cleaned; that that part of said water so used in the cleaning of said reservoirs was no longer available as a supply for the City of Pocatello, or its inhabitants, and was turned out of the said reservoirs and the supply to said city diminished accordingly.

Tenth, this defendant admits that he has caused to be placed certain contrivances, known as "reducers," in certain pipes leading to private residences and business houses in the plaintiff city, and alleges that said "reducers" are of standard construction in gravity water systems, and are necessary to be used for the purpose of controlling the flow of water in said pipes, and preserving said pipes and said system from destruction, and denies that the same prevent, or have prevented, the occupants of private residences and business houses, or private residences or business houses, from receiving a proper and adequate supply of water for purposes set forth in said ordinances, or either of them. This defendant denies that the inhabitants of the said city are not, or have not, during the summer months of each year, or at any other time or times, or at all, been furnished with a sufficient supply of water for culinary or domestic purposes or for lawn sprinkling or at all, and denies that the inhabitants of said city, or any of them, have heretofore by any acts of this defendant, his agents, or employees, suffered great, or any, annoyance, or inconvenience, and denies that the health of the said people, and the property of the said city, or either, has been, or are, during the periods mentioned in said

amended bill of complaint, or at any other period jeopardized by any acts of this defendant, his agents, or employees [28] or at all. And this defendant denies that he has committed any acts, or done anything, with the object and purpose of compelling the plaintiff or the inhabitants thereof, or any of them, to use only such supply of water as this defendant feels disposed to furnish to said city, or the inhabitants thereof, or any of them.

Eleventh, this defendant denies that the citizens of the City of Pocatello have paid when due all water rates and charges made by this defendant as provided in said ordinance marked Exhibit "A" to said amended bill, or at all, and denies that the schedule of rates and charges set forth in said Ordinance No. 86 is unreasonable, or unjust, or inequitable, or oppressive. This defendant admits that the plaintiff has frequently demanded that said rates be adjusted, but alleges that the plaintiff has unlawfully, wrongfully, unjustly and inequitably refused to proceed with the adjustment of the said rates in the manner provided in said Ordinance No. 86.

Twelfth, that whether the defendant, George Winter, mentally conceives the idea that he is the enemy of the citizens of Pocatello, and resorts to outrageous, or any, ways of venting his spite and spleen upon the citizens thereof, this defendant has not and cannot obtain sufficient knowledge or information on which to base a belief, and therefore denies the same. This defendant denies that the water from the said system has been shut off from the said city and its inhabitants without warning, and without necessity existing

therefor, or at all. This defendant denies that the said city has at defendant's orders, or by defendant's agents, or employees, been deprived of water entirely, or of adequate fire protection; denies that the lives and property of the citizens, or the property of the city, have been endangered by any acts, or omissions, of this defendant, his agents, or employees. This defendant denies that he, or his agents, or employees, of the defendant, George Winter, refuses to [29] make any attempt, or provision, to store water so that the city may be protected in case of fire, or at all. This defendant denies that prior to the time of the filing of the amended bill of complaint herein, or since said date, or at all, the City of Pocatello is in imminent, or any danger of being destroyed by fire, and denies that said citizens at said time, or since said date, or now have no adequate supply of water for domestic purposes, and denies that prior to the time of filing the amended bill of complaint herein, or since said date, or at all, said city has no water for street sprinkling except as obtained from other sources than the water system of this defendant.

Thirteenth, this defendant says that whether the said defendant, George Winter, was, during the last municipal campaign in said city, violently, or at all opposed to the election of any of the present city officers, and whether said defendant, George Winter, made threats openly and publicly, or at all, that if any of the said officers was elected he would cause the citizens trouble, this defendant has not and cannot obtain sufficient knowledge or information on which to base a belief and therefore denies the same. This

defendant denies that the defendant, or his agents, or employees, or any of them, have deliberately, or at all, caused the storage reservoirs containing the, or any, supply of water for any of the needs of the city to be emptied, and denies that by reason of any act or acts of this defendant, his agents or employees, the city has at any time been left without fire protection; and this defendant denies that he, his agents, or employees, or the defendant, George Winter, have, without notice, or at all, shut off the water service, and denies that he, or his agents, or employees, or said defendant, George Winter, now, or at any time, have threatened to cause all, or any, of the water supply for the plaintiff city to be turned into the Portneuf River, or to be used in any other way than for the [30] supply of the citizens of Pocatello in accordance with said ordinances.

Fourteenth, this defendant denies that the defendant, George Winter, or this defendant, is now engaged in running, and engaged in conducting the Pocatello water system for the sole and only purpose, or for the purpose, of causing the City of Pocatello, and its inhabitants, all, or any, annoyance, or inconvenience, or without due regard to the, or any, rights of the citizens, and denies that the defendants, or either of them, have openly, or at all, threatened to so operate said water system as to injure said city, or its citizens, or violate the said obligations of this defendant, and denies that the defendants, or either of them, have threatened that the worst is yet to come, and that the defendant, Winter, has just begun his campaign of malice, ill-will and hatred.

Fifteenth, and further answering, this defendant alleges that heretofore, and on, to wit, the 4th day of January, 1892, the town or village board of trustees of the town or village of Pocatello (now the City of Pocatello) duly passed an ordinance number 46, granting to F. T. Toms, John J. Cusick and James A. Murray, and to their successors and assigns, certain franchises, rights and privileges, a copy of which said Ordinance No. 46 is hereto attached and marked Exhibit "A" to this answer; that the said F. D. Toms, John J. Cusick and James A. Murray accepted the provisions of the said Ordinance No. 46 and constructed, maintained and operated a certain water-works system thereunder, for the purpose of supplying water to the town of Pocatello, which said system is the identical system described in said amended bill of complaint, except those certain additions thereafter made, and which are now a part thereof; that thereafter, and by mesne transfers and conveyances, all the rights, privileges and franchises acquired by said Toms, Cusick and Murray under and by [31] virtue of said Ordinance No. 46 and said water system so constructed thereunder, were transferred, conveyed, and set over to a corporation organized under the laws of the State of Idaho, with power to acquire the same, known and described as Pocatello Water Company, Limited; that subsequent to the 4th day of January, 1892, which was the date on which said Ordinance No. 46 was passed and approved by said board of trustees of the Town of Pocatello as aforesaid, and attested by the clerk of said board, and approved by the chairman thereof, and prior to the

8th day of June, A. D. 1898, the town of Pocatello was organized as a city of the second class, under and by virtue of the laws of the State of Idaho, and assumed and exercised the rights, duties, and privileges of such a city; that thereafter, and on the 8th day of June, A. D. 1898, the City of Pocatello, being then and there a city of the second class by its Mayor, and the City Council of said city, duly passed and approved an ordinance numbered No. 59, a copy of which ordinance is hereto attached and marked Exhibit "B" to this answer; that said Pocatello Water Company, Limited, accepted said Ordinance No. 59 and continued to maintain and operate said water system and make additions thereto, which system did on or about the 1st day of January, 1901, consist of certain diverting pipe-lines and water lines, reservoirs, supply pipes and certain water mains and pipes in the streets of the said city, through which water was then and there being supplied to said city and the inhabitants thereof; that thereafter, and on or about the first day of January, 1901, this defendant, James A. Murray, acquired by certain mesne conveyances all the rights, privileges and franchises held under or claimed by the said Pocatello Water Company, Limited, under said Ordinance No. 46 and Ordinance No. 59 aforesaid, together with all property of every [32] kind and nature then belonging to said corporation, including the water system then and now in use in said city as then constructed; that thereafter, and on, to wit, the 6th day of June, A. D. 1901, a certain ordinance known as Ordinance No. 86, was duly passed by the city council of the City of Pocatello,

and approved by the Mayor thereof, which said ordinance is fully and accurately set forth as Exhibit "A" to the amended bill of complaint herein. This defendant further alleges that on or about the — day of ——— A. D. —, a certain controversy arose between this defendant and the City of Pocatello concerning the use by the city of certain fire hydrants that had been theretofore installed in the said city by this defendant; that prior to said last mentioned date, the city, by and through its officers and employees, had used certain fire hydrants of this defendant installed in said city for the purpose of filling therefrom certain water wagons used by the city and its employees in sprinkling the streets of said city; that the said city and its employees had carelessly and negligently used said fire hydrants so as to permanently damage the same and damage this defendant's said water system. Thereupon this defendant demanded of said city that it desist from using said fire hydrants for the purpose of supplying water to the water wagons for the purpose of sprinkling said streets, and further demanded that other special connections be made with this defendant's water system for the purpose of supplying said water wagons. That, thereupon, said city by its officers and employees, refused to accede to the demands of this defendant, whereupon this defendant caused a certain suit to be filed in the District Court in and for the County of Bannock, State of Idaho, wherein and whereby the matters and things above mentioned were fully set forth, and this defendant prayed for an injunction to enjoin said city from such wrongful and

unlawful use of such fire hydrants. That, thereupon an agreement was entered into between this defendant and said city [33] in settlement and compromise of said suit, wherein and whereby it was mutually agreed that certain stand-pipes of a certain definite construction, containing certain contrivances known as "reducers," should be erected for the use of the said city in sprinkling the said streets, and that the said city thereafter would use such stand-pipes exclusively in obtaining water for sprinkling streets. That pursuant to the said agreement, said city designated the places where it desired said stand-pipes to be erected, and the same were erected by the city at its own cost and expense.

Sixteenth, this defendant further alleges that in a short time after the 6th day of June, 1901, and within ninety days thereafter, this defendant began the construction of a water line for the purpose of diverting water from the said Mink Creek in and to certain reservoirs, a part of said water system which had theretofore been constructed by the said defendant and his predecessors in title for the purpose of supplying the said city with water; that said City of Pocatello and its officers were at all times fully advised of the commencement and progress of said construction, and made no complaint thereof and no objection thereto, and this defendant continued said construction and completed the same at a large cost and expense, and has ever since maintained the same as and of its original size and capacity; that for a long time prior to the first day of January, A. D. 1901, this defendant and his predecessors in title had

constructed and continuously maintained certain water lines, pipes and conduits for the purpose of carrying water from Gibson Jack Creek and Cusick Creek to said reservoirs for the purpose of supplying said system; that the main supply for said system is and has at all times mentioned herein been supplied from said Gibson Jack Creek and Cusick Creek; that at the time of the construction of said water way from said [34] Mink Creek to said reservoirs, it was the purpose and intent thereby to supplement the said supply from Gibson Jack and Cusick Creeks, so that this defendant could by and through the said system, furnish a sufficient supply of water to the City of Pocatello and its inhabitants for the sprinkling of the streets, extinguishing of fires, domestic and culinary purposes, and the sprinkling of lawns; that the supply so secured by this defendant, and ever since maintained by him, was then and at all times has been, and now is, adequate and sufficient for each, every and all of said purposes, and that the water thereby supplied is now and has at all times been pure and healthful; that the defendant, at great cost and expense completed the construction of the said water way from Mink Creek to said reservoirs with the knowledge and full acquiescence of the said city as aforesaid of and in its adequacy and sufficiency, and that for more than five years from and after the construction of the same, the said city made no protest, claim, demand, or contention to the contrary, or that the same as constructed, did not fully comply with the requirements of said Ordinance No. 86; and has been guilty of great, wrongful and inequitable

laches in the premises.

Seventeenth, and for a further defense, this defendant alleges that heretofore, and on, to wit, the 19th day of January, A. D. 1909, the said City of Pocatello filed its bill of complaint in the Circuit Court of the United States in and for the Ninth Judicial Circuit, District of Idaho, against this defendant, James A. Murray, doing business under the name of the Pocatello Water Company, at Pocatello, Idaho, in which bill of complaint said plaintiff alleged in substance that this defendant had during all of the times mentioned therein, been doing business in the said City of Pocatello under the name and style of the Pocatello Water Company; that this defendant, his grantors and predecessors in interest, were, and the defendant then was, the owner and in [35] possession of the waterworks plant and water system for supplying the City of Pocatello, and the inhabitants thereof, with water for public and private purposes; that defendant so operated said water system under and by virtue of the franchises granted him by the City of Pocatello under and by virtue of Ordinance No. 86 of said city, which ordinance did so lodge, confirm, and continue through and in the defendant certain privileges and franchises theretofore granted to his predecessors in title, and that this defendant as the legal successors of said parties, made a contract with said City of Pocatello for supplying said city with water for public and private use; that said ordinance fixed the rates to be charged for water, provided a means of ascertaining the value of said water system as a basis for readjustment of rates for the future,

and in the event of a sale, and waived the right on the part of the city to build, own and acquire a competitive water system except under certain conditions, and waived the right of the said city to grant to others franchises more favorable than those then granted to this defendant; that said Ordinance No. 86, duly and regularly passed and approved on June 6th, A. D. 1901, at all times thereafter continued in full force and effect; that this defendant immediately upon the passage and approval of the said ordinance accepted the same and the franchises granted thereunder and thereby, with all the terms and conditions thereof, and that at all times since the date of the passage of the said ordinance had operated, and was then at the time of the filing of the said bill of complaint, operating said water plant and system by virtue of the provisions of the said ordinance, and not otherwise; that more than five years had elapsed since the passage of the said ordinance, and that under the provisions of the laws of the State of Idaho, said plaintiff, the City of Pocatello, was entitled to have a new schedule of rates and water charges fixed; that the schedule of rates and charges fixed by said Ordinance [36] No. 86 on June 1st, 1901, and ceased to be reasonable and proper, and was no longer a just measure of the amounts that ought to be paid to it for water furnished under said franchises, and that said rates so fixed had become and were excessive, extortionate and oppressive in each and every instance; that under and by virtue of the act of the legislature of the State of Idaho approved March 16th, A. D. 1907, amending action 2711 of the Revised Statutes of the State of

Idaho as amended by the act of March 9th, 1905, said plaintiff was entitled to have the rates to be charged for water determined by commissioners to be selected as provided in said act; that said City of Pocatello on July 20th, 1908, had by resolution declared said rates to be unreasonable, and appointed two commissioners to act on behalf of the city, with such as might be appointed by the defendant, for the purpose of determining the rates to be charged for water under and pursuant to the provisions of the acts of the legislature referred to, and that thereafter, a demand was served upon the defendant by and through one, George Winter, superintendent of said water company, and the representative of the defendant, requiring him to appoint two commissioners to join with the commissioners theretofore appointed by the city, to fix rates and charges for water to be supplied by this defendant under its said franchises; that the defendant had wholly neglected, failed and refused to appoint commissioners under said law of the State of Idaho, and therein and hereinbefore cited and referred to and has continued to refuse so to do, or to join with the plaintiff as required by said law, in fixing and providing new rates and charges for furnishing water to the said city and the inhabitants thereof under his said franchises, and that he had by said refusals incurred the penalties provided in said act, and prayed, *inter alia*, for subpoena for the fixing and adjusting of rates, for the appointment of a receiver, for judgment for the penalty prescribed by the act, and for other and further relief. A copy of said bill [37] of complaint is hereto annexed,

marked Exhibit "C," and made a part of this answer. That thereafter a demurrer was filed by this defendant, a copy of which demurrer is hereto attached, made a part of this answer, and marked Exhibit "D." That thereafter, said cause came on to be heard before said Circuit Court for the District of Idaho upon the demurrer so interposed by this defendant, and the Court being fully advised in the premises, sustained said demurrer, and ordered said bill dismissed, which order was duly entered of record in said cause, and said bill dismissed. That a copy of the judgment and decision and opinion of the Court in said cause are hereunto annexed as a part of this answer, and marked Exhibits "E" and "F" hereto; that said judgment has not been appealed from, or set aside, and the same is still in full force and effect; that in and by the decision of said Court, it was adjudicated and declared that sections 3, 4, and 5 of said Ordinance No. 86 were then and there in full force and effect, unimpaired by the said legislation of the State of Idaho. That notwithstanding the provisions of the said sections of said Ordinance No. 86, and notwithstanding said adjudication by said Circuit Court of the United States for the District of Idaho that said sections were and are unimpaired by the said legislation of the said State, the plaintiff has wrongfully, unlawfully, unjustly and inequitably refused to be bound thereby, and has repudiated the same, and will not abide by the terms thereof; that the sale and only consideration for the agreement of this defendant to bring in the, or any, of the waters of said Mink Creek, was the covenants contained in sections 3, 4, 5, 6 and

7, of said Ordinance No. 86, all of which said covenants have been repudiated and abjured by the plaintiff herein.

Eighteenth, and this defendant further says that the supply of water furnished by him in and through the said system to the city and inhabitants of Pocatello is such that during a large [38] portion of each and every year there is no necessity for any restriction of the use thereof; that during certain portions of certain years preceding the filing of the amended bill of complaint herein, this defendant has caused certain rules and regulations to be promulgated for the purpose of equitably guarding and distributing the water supply for the said city; that said rules and regulations have at all times been just and reasonable, and adapted to the securing of such results; that during certain dry seasons preceding the filing of said amended bill of complaint, certain inhabitants of said City of Pocatello were aided, abetted and encouraged by the officers of the said city to make wrongful and wasteful use of the said water supplied by this defendant through said system, and did waste and wrongfully use the same, and apply the same to divers unlawful and excessive purposes and uses; and said City of Pocatello, by its officers, have violated and now are violating and disregarding said rules and regulations, and agreement, pertaining to the use of the standpipes and the use of the fire hydrants for street sprinkling purposes, and by and through the unauthorized and wrongful use thereof, have, and are, damaging and destroying the defendant's said water mains, hydrants and con-

nections, and thereby have encouraged, and now are encouraging, certain inhabitants of said city to disregard said rules and regulations promulgated by this defendant for the protection of the water available in said system from waste and misuse; that as a result thereof the water available for the supply of the said city for proper and lawful uses, was, by the inhabitants of the said city, unjustly and inequitably wasted, dissipated, and put to unlawful purposes in disregard of the rights of this defendant as the owner and operator of the said system, and in violation of law; that neither said city nor the inhabitants thereof have performed the covenants and obligations on their behalf undertaken as hereinbefore set forth; that [39] said city has not paid, and has refused to pay, the rental price stipulated in said Ordinance No. 86 to be paid for the hydrants installed for the said city. That notwithstanding the covenants of said Ordinance No. 86, and notwithstanding the former adjudication by this court as aforesaid concerning said covenants, the said city has persistently, and maliciously continued its efforts to compel a reduction of this defendant's said rates in a manner other than that provided by said ordinance, and has harassed this defendant with vexatious and costly litigation for the purpose of compelling this defendant to agree and concur in the adjustment of said rates by a hostile body composed of the water users and taxpayers of the said city, and has openly threatened that it will compel this defendant to readjust and lower said rates in a manner contrary to the covenants of said ordinance, or in the event of

failure so to do, will attempt to acquire the said property of this defendant at an inadequate price and in a manner different from the manner prescribed by the said ordinance. That said city by its said unlawful acts, and its said disregard and refutation of the obligations of said Ordinance No. 86 so imposed upon the said city, and its insistence upon a readjustment of the rates for service, in violation thereof has greatly impaired the value of this defendant's said property. That notwithstanding the attempts of said city to deny to this defendant the right to collect rates which will pay a fair return upon the capital already invested and upon further investments of capital, and notwithstanding the fact that the acts of the said city have so impaired the value of the said property that it cannot carry an additional investment, said city, through its officers, has been wrongfully, unjustly and inequitably demanding of this defendant that further investments be made therein. That the plaintiff city, with a view to and for the purpose of annoying and embarrassing this defendant in the conduct of the business of said Water Company, and for the purpose of depreciating the value of his said [40] water plant and to cause defendant to grant to said city and its inhabitants rights and privileges to which they were not entitled and which would have been destructive of the said water plant and system, and for the purpose of coercing defendant into consenting to a readjustment of rates to the advantage of said city and its inhabitants and in a manner other than as provided for in said ordinance, did proceed to acquire and did

acquire a water right and did construct a ditch to convey the water so purchased and acquired to said City of Pocatello for use by said city and its inhabitants, all of which was in contravention of, and contrary to, the provisions of said Ordinance No. 86 hereinbefore referred to.

That, before the institution of this suit, the plaintiff city by its mayor and council adopted a resolution declaring the rates fixed by said Ordinance No. 86, unconscionable, unjust and unreasonable, and appointed commissioners for the purpose of fixing rates without a compliance with, and in disregard of, the provisions of said ordinance relative to a readjustment of rates.

That each and every of said acts and things were done and committed by the officers of said city for the purposes as above set forth; that such acts, doings and proceedings were published and made known to the patrons of said company and resulted in a demoralization of the water service and injury to the business and resources of said water company, and instigated, incited and encouraged the patrons of said water company to disregard and refuse to abide by the rules prescribed by said company and necessary for the conduct of its business and the preservation of its property.

Defendant says that said city has itself been guilty of unjust and inequitable conduct; that by reason of said wrongful conduct on the part of defendant by its officers, plaintiff has no just grounds of complaint against defendant and is not entitled to the relief prayed for nor to any relief in a court of equity.

[41] And this defendant denies all, and all manner of unlawful combination and confederacy, where-with it is by the said bill charged, without this; that there is any other matter, cause or thing in the said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

JAMES A. MURRAY,

Doing Business as the Pocatello Water Company.

By GEORGE E. GRAY,

N. M. RUICK,

WILLIAM V. HODGES,

Solicitors for said Murray.

GEO. E. GRAY,

N. M. RUICK,

WILLIAM V. HODGES,

Solicitors for Defendant.

GERALD HUGHES,

CLAYTON C. DORSEY,

Of Counsel. [42]

Exhibit "A" [to Answer to Amended Bill of Complaint].

ORDINANCE NO. 46.

Be it ordained by the board of trustees of the town of Pocatello.

Section 1. That there is hereby given, conferred and granted unto F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right, authority, privilege, and permission to construct, maintain and operate an entire and complete system of water mains, pipes, and conduits, and also a right of way over, along and under all and every street, alley and public highway, within the corporate limits of the town of Pocatello, for the purpose of laying along, over and under said streets, alleys and public highways, water mains, pipes and conduits, for the purpose of furnishing and *supply* the said town of Pocatello, and the inhabitants thereof, with a sufficiency of pure and healthful water.

Section 2. The said grant of privileges, mentioned in section one hereof, unto the said F. D. Toms, John J. Cusick, and James A. Murray, their associates, successors and assigns, shall be, continue and exist for a period of fifty years from the passage and approval of this ordinance.

Sec. 3. The grant of privileges contained in section one and two of this ordinance, is subject to the following conditions and limitations, to wit:

First. That said F. D. Toms, John J. Cusick and

James A. Murray, their associates, successors and assigns, shall within four months from and after the passage and approval of this ordinance, begin work in good faith, in and about the ditch, or flume, as may be necessary for conveying water to within or near said town of Pocatello, and shall continue said work, with reasonable diligence to completion thereof, and [43] shall finally complete the said work to the extent hereafter mentioned, in such manner as to be in operation and convey water to the citizens and inhabitants of the town of Pocatello, within one year from and after the passage and approval of this ordinance.

Second. The said water so used, shall be conveyed from the creeks on the Fort Hall Indian Reservation, known as Mink and Gibson Jack Creeks and shall be in quantity sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello, and shall be of pure and healthful quality.

Third. Said water shall be conveyed to a point above the town of Pocatello, and shall be confined in a suitable and substantial reservoir or reservoirs, that the pipes or mains, on Center street, shall have a pressure of at least one hundred and fifty feet perpendicular fall.

Sec. 4. The said F. D. Toms, and John J. Cusick and James A. Murray, their associates, successors and assigns, shall at the time of laying their pipes and mains, through the streets and alleys of the town of Pocatello, and within one year aforesaid, lay at least one main or pipe, from the reservoir above the town, to Second Avenue on the easterly side

of the Union Pacific Railroad tracks, which main or pipe, shall be at least eight inches in diameter. The said main or pipe, and all mains, pipes and laterals so laid, shall be of good substantial material, sufficient to resist the pressure of 150 feet perpendicular fall, provided, however, that in the event of trouble with the Indians of Fort Hall Reservation, or litigation of any kind, involving the right to, or possession of the waters of Mink, or Gibson Jack Creeks, or in the event of unforeseen or unavoidable delays, or providential hindrances, the time so delayed shall not be recovered against this chapter in the [44] year given, to conduct said water to Second Avenue, on the easterly side of the Union Pacific Railroad tracks and in the laying of the two miles of said lateral.

Sec. 5. That in addition to the eight inch main or pipe, mentioned in section four hereof, the said F. D. Toms, John J. Cusick and James A. Murray, or their associates, successors or assigns, shall also at the time of laying their mains and pipes, along and under the streets and alleys of the town of Pocatello, lay at least two miles of mains or pipes known as laterals, which laterals shall not be less than four inches in diameter, and of good, substantial material, equal in strength to the main pipe mentioned in section four hereof.

Sec. 6. That when the said eight inch main or pipe, mentioned in section four hereof, shall have been laid to Second Avenue, on the easterly side of the Union Pacific Railroad track, and when the said two miles of said lateral shall have been laid, the condition of this grant of privileges, in that respect shall be deemed to have been fully complied with, and

thereafter main pipes and laterals, may be laid as the occasion or consumption demands.

Sec. 7. The franchises and privileges, herein granted to the said F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, shall commence and be in effect, from and after the passage and approval of this ordinance and shall continue and be in full force and effect, for the term of fifty years, upon the said F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, complying with all the requirements in this ordinance contained, and their filing with the clerk of the town of Pocatello, at any time before work is commenced within the corporate limits of said town, a good and sufficient [45] bond in the sum of \$10,000.00, with two or more sufficient sureties, conditioned to indemnify the said town of Pocatello, against all loss and damage done, or occasioned by reason of the construction, maintenance, and operation of said water system. But should F. D. Toms, John J. Cusick and James A. Murray, or their associates, successors or assigns, refuse, or fail to fulfill or perform the conditions heretofore imposed upon them, then the board of trustees of Pocatello, or their successors may at any time, after giving the said F. D. Toms, John J. Cusick and James A. Murray or their associates, successors or assigns, reasonable notice, and their continued failure to perform the conditions hereof, revoke, avoid and annul this ordinance and all the rights, privileges and franchises hereby granted.

Sec. 8. This ordinance to be in effect from and

after its passage and approval.

Passed and approved by the board of trustees
January 4th, 1892.

E. G. GALLET,
Clerk.

Approved by the chairman of the board of trustees
of Pocatello, Idaho, on the 4th day of January, 1892.

D. SWINEHART,
Chairman. [46]

**Exhibit "B" [to Answer to Amended Bill of Com-
plaint].**

ORDINANCE NO. 59.

A bill for an ordinance entitled "an ordinance confirming and continuing the privileges and franchises of The Pocatello Water Company, limited, a corporation, and making a contract with the City of Pocatello for the supply of water by said company for public and private purposes."

PREAMBLE.

WHEREAS, the village or town of Pocatello, on the 4th day of January, 1892, by due and legal village ordinance numbered forty-six (46), given, conferred and granted unto F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right, authority, privilege and permission to construct, maintain and operate an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the town of Pocatello, for the period of fifty (50) years, for the purpose of laying along,

over and under said streets, alleys and public highways water mains, pipes and conduits, for the purpose of furnishing and supplying said town of Pocatello and the inhabitants thereof with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant; and

WHEREAS, the said F. D. Toms, John J. Cusick and James A. Murray, and their associates, successors and assigns, fully complied with said conditions precedent and obtained vested rights under said grant; and

WHEREAS, the Pocatello Water Company, Limited, a corporation duly organized and existing under and by virtue [47] of the laws of the State of Idaho, is the legal successor and assign of the said F. D. Toms, John J. Cusick, and James A. Murray and their associates, and succeeded to and enjoys all the privileges and franchises conferred and given by said original grant; and

WHEREAS, the City of Pocatello, a city of the second class, is the legal municipal successor of the said village or town of Pocatello; and

WHEREAS, the said persons and their successor, the said Pocatello Water Company, Limited, has constructed and maintained a complete and efficient system of waterworks for supplying wholesome water in sufficient quantities for public and private purposes to said City of Pocatello and the inhabitants thereof at a cost of some one hundred and fifty thousand dollars (\$150,000.00); and

WHEREAS, a commissioner, duly appointed and constituted in accordance with the provisions of the

revised statutes of the State of Idaho, did, in accordance with the law in that behalf made and provided, on or about the first (1st) day of September, 1896, make and establish rates and charges for water service by said company, both public and private; and

WHEREAS, said rates and charges are deemed to be fair, equitable, reasonable and just, and will be fair, equitable, reasonable and just in the near future; and

WHEREAS, the capital invested in said water works is great and only returns an annual net earning of about three per cent; and

WHEREAS, for the better distribution of water, and in order to keep the same pure and wholesome and free from defilement by foreign substances, and to increase the [48] quantity thereof, and to safeguard the health of the public, it is necessary for said company to abandon its wooden flume, and to pipe the same with steel for many miles from the point of diversion of water from Gibson Jack Creek to the reservoirs southwest of Pocatello City, and at a cost of about thirty thousand dollars (\$30,000.00); and

WHEREAS, said company, before incurring so great an additional outlay, desires to be protected against arbitrary and unreasonable changes in the near future, and asks some reasonable assurance that such arbitrary changes shall be made, as a condition precedent to the expenses of laying of said pipe-line; and

WHEREAS, the demand of said company is deemed reasonable and just; and

WHEREAS, it is deemed to be for the best interest of the City of Pocatello to extend the assurance asked for,

NOW, THEREFORE, Be it Ordained by the Mayor and Council of the City of Pocatello;

Section 1. The privileges and franchises originally given, granted and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, as recited in Pocatello Town Ordinance No. 46, passed and approved January 4th, 1892, are hereby continued and confirmed to the Pocatello Water Company, Limited, a corporation, the successor of F. D. Toms, John J. Cusick, and James A. Murray, and their associates, according to the terms of the original grant.

Section 2. The schedule of rates and charges for water and water service both public and private, supplied and rendered by the said company to the City of Pocatello and the inhabitants thereof, fixed and adopted by the commission appointed according to law, and reported and filed on or about September 1st, 1896, and now in force and effect, is hereby declared to be fair, equitable, reasonable and just, [49] and to be the schedule of rates and charges for water and water service by said company, both public and private, to wit:

(Schedule of Water Rates omitted because the same is in the Statement of facts herein.)

Provided, that in cases where consumers are paying for either resident or lawn sprinkling privileges, no charge shall be made for one horse or cow, and where consumers are paying for both lawn and res-

idence privileges no charge shall be made for one horse and one cow, or two horses or two cows.

Provided, that in case the City of Pocatello shall desire more than twenty-eight fire hydrants, a monthly rental of \$5.12½ per hydrant shall be charged said city for such additional hydrants so furnished and maintained.

Sec. 3. The foregoing rates and charges are hereby adopted by the City of Pocatello and by and for itself, and as trustee for the use and benefit of all private consumers of water within the corporate limits of said city, for the full period of three years from the passage and approval of this ordinance.

Sec. 4. At the end of said period of three years, or thereafter at any time within the period of the grant or franchise, if it shall appear by competent evidence that the said company then is, and has been constantly supplying water at the said rates, for a preceding period of twelve months, to twelve hundred (1200) or more private families under this ordinance, then, upon notice to said company by resolution of the City Council of Pocatello, and within sixty (60) days after the service of the said notice, the company shall reduce the rate for private families to one dollar (\$1.00) per month and lawn sprinkling to fifty cents (50¢) per month per lot, instead of the present schedule rates. [50]

Sec. 5. Within thirty (30) days from the passage and approval of this ordinance the said company shall commence the improvements and the laying of said line of pipe mentioned in the Preamble, and carry on the same to speedy and effective completion,

without unnecessary delays, interruptions, or discontinuances, and such compliance with this ordinance shall entitle this company to the benefit of its provisions as in virtue of an executed contract; but if more than thirty (30) days shall elapse without such commencement by said company, this ordinance shall lapse and be declared null and void.

Sec. 6. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

Passed this 7th day of June, 1898.

J. J. GUHEEN,
Clerk.

Approved this 8th day of June, 1898.

A. B. BEAN,
Mayor. [51]

Exhibit "C" [to Answer to Amended Bill of Complaint — Bill of Complaint in City of Pocatello etc. vs. Murray etc.].

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Idaho.

THE CITY OF POCA TELLO, a Municipal Corporation,

Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the Name of POCA TELLO WATER COMPANY at Pocatello, Idaho,

Defendant.

BILL OF COMPLAINT.

To the Judges of the Circuit Court of the United States for the District of Idaho;

The City of Pocatello, a municipal corporation, of Pocatello, and a citizen of the State of Idaho, brings this bill against James A. Murray, of Butte City, and a citizen of the State of Montana.

And thereupon your orator complains and says:

I.

That at the times mentioned in this bill of complaint, the plaintiff, the City of Pocatello, was, and now is, a public municipal corporation, organized and existing under and by virtue of the laws of the State of Idaho, relating to the creation and government of cities and villages in said state, and had adopted and now has, a city government, together with the duly elected, qualified and acting officers provided by law for a city of the second class, and with its locus within the territorial limits of the County of Bannock, in said State of Idaho; and that at the commencement of this action the said City of Pocatello was, and now is, a citizen of the State of Idaho. [52]

II.

That the defendant named above, James A. Murray, is a citizen of the State of Montana, and customarily has, keeps and maintains his residence at Butte City, in the County of Silver Bow, in the said State of Montana, and at the commencement of this action was, and now is, a citizen of the said State of Montana.

III.

That at the dates and times mentioned in this bill of complaint the defendant was, and now is, doing business in said City of Pocatello, in the said County of Bannock, and State of Idaho, under the name and style of the Pocatello Water Company.

IV.

That the defendant, James A. Murray, and his grantors and predecessors in interest, at all the times mentioned herein were, and the defendant now is, the owner, and in the possession and operating a certain waterworks plant and water system, which supplies the said City of Pocatello and the inhabitants thereof with water for public and private uses; that said waterworks plant and water system consists of reservoirs, which are filled with the waters of certain mountain streams in said Bannock County, a pipeline or lines tapping said reservoirs and leading to trunk water mains and laterals, which said water mains and laterals run through and along all of the principal streets and thoroughfares of said City of Pocatello, connect with the private pipes, hydrants and premises of the inhabitants of said city, and with public buildings therein and supply water for public and private consumption, and for garden and irrigation purposes; [53] that to and with said water mains and laterals there are connected about fifty-three fire hydrants for furnishing water for fire purposes, street sprinkling, and other public purposes and that said waterworks plant and water system is the only one in existence in said city.

V.

That the defendant, at all the times mentioned herein, was, and now is, operating said waterworks plant and water system under and by virtue of a certain franchise granted him by the Mayor and Council of the City of Pocatello in form and manner as prescribed by law, and more particularly under and by virtue of what is known in the archives of said city as Ordinance No. 86, which said ordinance was and is entitled, "An ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray for supplying said city with water for public and private use, fixing the rates to be charged for said water, providing a means of ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of a sale, and waiving the right on the part of the city to build, own or acquire a competitive water system except under stated conditions, or of granting to others more favorable terms of franchises than now held and granted to said James A. Murray, which said Ordinance No. 86 was duly and regularly passed and enacted by the Council of said City of Pocatello on the 6th day of June, 1901, and thereafter duly and regularly approved by the then duly elected, qualified and acting Mayor of said City of Pocatello, on the said 6th day of June, 1901; that said Ordinance No. 86, at all times mentioned in this bill of complaint was, and now is, in full force and [54]

effect; that a true copy of said Ordinance No. 86 is hereto attached, marked Exhibit "A," and the same is hereby referred to in this connection, and made a part of this bill of complaint.

VI.

That the defendant, James A. Murray, immediately upon the passage and approval of said Ordinance No. 86, accepted the same, and the franchise granted thereunder and thereby and all the terms and conditions thereof, and at all times since said 6th day of June, 1901, has operated, and does now operate, his said waterworks plant and water system in virtue thereof, and not otherwise.

VII.

The plaintiff further alleges that the period of six and one-half ($6\frac{1}{2}$) years has elapsed since the rates and charges for water under said Ordinance No. 86 were fixed, in manner and form as set out in section 2 of said ordinance, and that under the laws of the State of Idaho, the plaintiff, for a long time has been and now is entitled to have a new schedule of water rates and charges fixed, both for itself and for the inhabitants of said city, governing the use of, and payment for, water furnished by the defendant under his said franchise, and that the limitary period for which rates and charges were fixed by said Ordinance No. 86, expired on the 6th day of June, 1906; that the schedule of rates and charges for water fixed by said Ordinance No. 86 on June 6th, 1901, have ceased to be reasonable and proper and are no longer a just measure of the amounts that ought to be paid by the plaintiff and the inhabitants of said city to the de-

fendant for water furnished under his franchise, in view of the growth and expansion of said city, the great increase in the number of the population, and the inferior and unsatisfactory water service furnished by the defendant; and that the rates [55] and charges fixed by said Ordinance No. 86 in the year 1901 are now excessive, extortionate, and oppressive in each and every instance.

VIII.

That under the laws of the State of Idaho, and in particular an Act of the Legislature approved March 16th, 1907, and entitled "An act to Amend Section 2711 of the Revised Statutes of the State of Idaho, as amended by an Act Approved March 9th, 1905," it is provided that the rates to be charged for water by all persons, companies or corporations supplying water to towns and cities must be determined by commissioners to be selected as herein provided, to wit, two by town or city authorities, each to be a taxpayer of the given town or city, and two by the *the* person, company or corporation supplying water, the last two to be selected within thirty (30) days after written notice of the action of the town or city, which said notice shall have been given and made within ten (10) days after the selection by the town or city of the first two commissioners; that it is further provided by said laws of Idaho that in case said four commissioners, selected as aforesaid, cannot agree upon the rates to be fixed, they must select a fifth commissioner, who shall also be a taxpayer of such town or city, and in case they cannot agree on such fifth commissioner, then the Probate Judge of the county in which such

town or city is situated must, within ten (10) days after notice to him by the four commissioners already so selected that they cannot agree on a fifth commissioner, proceed to select a fifth commissioner, qualified as in said laws provided; that the decision of the majority of the commissioners thus selected must fix and determine the rates to be charged for water for all uses and [56] purposes for the period of three (3) years then next ensuing from the date of such decision, and until new rates are established as by said laws provided; that the decision of such commissioners must be made within ninety days from the date on which such board of water commissioners is complete; and that any person, company, or corporation supplying water, and failing or refusing within the time specified by law to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars (\$100.00) per day for every day thereafter, and until such commissioners are appointed.

IX.

That on the 20th day of July, 1908, the plaintiff, by due and legal resolution of its City Council, duly introduced, passed and approved by its Mayor, made and appointed two (2) commissioners under the said laws of the State of Idaho for the purpose of fixing rates and charges for water to be furnished by the defendant under his said franchise for the period of three (3) years then next ensuing, to wit: J. H. Townsend and D. W. Church, which said commissioners were and are residents and taxpayers of the said City of Pocatello; that within ten (10) days

thereafter, and on, to wit, the 28th day of July, 1908, the plaintiff caused written notice of its action in that behalf to be made and served upon the defendant, requiring him to appoint two (2) other commissioners as by law provided, and to join with the plaintiff's commissioners in fixing new rates and charges for water to be furnished under his said franchise to the plaintiff and its inhabitants for the period of three (3) years then next ensuing; that said service of said written notice was made upon the defendant by personally delivering the same to and leaving it with one, George Winter, at said City of Pocatello, Bannock County, Idaho, on the said 28th day of July, A. D. 1908; that at the [57] time of said service of said written notice as aforesaid, the said George Winter was, and for the period of thirteen (13) years immediately preceding said date continuously had been, and now is, the sole manager, sole director, sole responsible agent, sole superintendent and controller of said waterworks plant and water system of the defendant James A. Murray; that on said date last above mentioned the defendant, James A. Murray, was a nonresident of the State of Idaho, and was absent therefrom, and was not to be found therein, after diligent search in that behalf; that said James A. Murray had not been within the limits of the State of Idaho for a long time prior to said 28th day of July, 1908, and has not been within the limits of the State of Idaho at any time or times since said date of July 28th, 1908; that while said James A. Murray maintains and claims a legal residence in the State of Montana, it is his custom to

travel and spend much of his time in other States of the American Union, and in particular in the State of California, and that for these reasons the plaintiff was and is unable to serve said attorney notice upon the said James A. Murray personally, and for the like reasons is and will be unable to procure personal service of the subpoena or summons upon the said James A. Murray in this action or proceeding; and the plaintiff further alleged upon its information and belief, and upon its information and belief states the fact to be, that the said James A. Murray remains without the State of Idaho for the express purpose of defeating the appointment of commissioners under the laws of the State of Idaho and the fixing by them of new rates and charges for water as therein provided, and for the purpose of defeating and preventing personal service of the subpoena or summons in this action, and for the purpose of hindering [58] delaying and preventing the plaintiff from recovering its demand in this action; and that by reason of the premises last aforesaid, the plaintiff has no plain, adequate, or speedy remedy, and is compelled to and does invoke the jurisdiction of this court on its equity side, as hereinafter more particularly set forth.

X.

That the defendant wholly failed, neglected and refused to appoint commissioners under the said laws of the State of Idaho for the period of thirty (30) days after due service of the written notice hereinbefore referred to and fraudulently, wrongfully, unlawfully and maliciously, failed, neglected and re-

fused, and still fraudulently, wrongfully, unlawfully and maliciously fails, neglects and refuses to join with the plaintiff as required by law in fixing and providing new rates and charges for furnishing water to said city and its inhabitants under his said franchise; that by reason of such failure, neglect and refusal the defendant has forfeited and now owes to the plaintiff the sum of one hundred dollars per day from and after the 28th day of August, 1908, or for 143 days up to the date of the filing of this bill of complaint, and making a gross sum of fourteen thousand three hundred dollars (\$14,300.00); that the said sum and demand of \$14,300 has not been paid to the plaintiff by the defendant, nor any part thereof, and that the full sum of \$14,300.00 is now due, justly owing and unpaid by the defendant.

XI.

Plaintiff further alleges that the water works plant and system of the defendant, hereinbefore referred to and described, for a long time has been, and now is, [59] mortgaged to certain eastern creditors of the said defendant, James A. Murray, and in the sum or amount of about four hundred thousand dollars (\$400,000), and that said mortgage debt exceeds in amount the present and probable future value of said waterworks plant and water system; that the monthly cash revenue of said waterworks plant and water system is now about five thousand dollars (\$5,000); that said monthly revenue is collected and disposed of by the said George Winter, sole manager, sole director, sole agent and superintendent, as aforesaid of said waterworks plant and

water system, and by directions of the defendant herein is by said George Winter sent out of the State of Idaho monthly, and into the States of Montana and California or wherever the defendant may happen to be and may require said moneys to be sent, and that the same is done with the fraudulent design and intent to withdraw said moneys and all of them from the jurisdiction of the courts of the State of Idaho and of this Court; that in the event of the recovery by the plaintiff of its demand, or any part thereof, the property of the defendant remaining within the State of Idaho will be wholly insufficient to meet and pay the same, or any part thereof, and there will be no moneys or revenues of said waterworks plant and water system belonging to the defendant which may or can be reached by legal or equitable process out of this or any other court and applied to the liquidation of any judgment which the plaintiff may recover; and that in order to protect the rights of the plaintiff it is necessary that a receiver be appointed by this Court to collect and safely keep the monthly cash revenues of said waterworks plant and water system, and to hold the same subject to the order of this Court, and to expend and apply the same or such part thereof as may be necessary, in such manner and for such purposes as this Court may hereafter order and adjudge in the premises. And the plaintiff further alleges that in order that [60] it may have the relief to which it is entitled in the matter of fixing new rates and charges for water to be furnished by defendant under his said franchise to the plaintiff and its inhabitants for

the period of three years now next ensuing, or any part of such relief, it is necessary that this Court interpose and intervene by the exercise of its equity powers, and proceed to make and fix reasonable rates and charges in the premises, either in conjunction with the commissioners of the plaintiff nominated and appointed as hereinbefore set out, or independent of such commissioners, and as to this Court shall seem meet and proper.

WHEREFORE the plaintiff prays:

1. That a subpoena may issue out of this Court, in accordance with the usual practice in that behalf, directed to the defendant, the said James A. Murray, doing business under the name of the Pocatello Water Company, and requiring and directing him to appear and answer the plaintiff's bill of complaint upon a day certain, and to abide the judgment of this Court in the premises.

2. That the Court make, fix, and promulgate reasonable rates and charges for water to be furnished by the defendant under his hereinbefore mentioned franchise and grant to the plaintiff and its inhabitants for the period of three (3) years next ensuing from the date of the Court's order and judgment in the premises, and adjudge and decree that the same as fixed, made and promulgated are just and reasonable; and that the defendant be restrained and enjoined from making, fixing, or promulgating any other rate or rates, charge or charges for water so to be furnished for said period of time, and from collecting or receiving any other or greater rate or rates, charge or charges for water during said time.

3. That the Court, by due order made in that behalf, may appoint a temporary receiver of the waterworks plant and [61] water system of the defendant, James A. Murray, and may order and require said receiver, when he shall have duly qualified for his trust and office to collect and safely keep all the monthly or other cash revenues of said waterworks plant and water system, and to deposit the same at such place and in such institution as the Court shall or may order, and to finally apply and expend and dispose of the same in such manner and for such purpose or purposes as this Court may or shall further order, and to do any and all other things in the premises which this Court may or shall order and require as a court of equity.

4. For final judgment against the defendant herein, upon the trial of the issues herein, in the sum of One Hundred Dollars (\$100.00) per day from the 28th day of August, 1908, to the date of filing of this bill of complaint, or Fourteen Thousand Three Hundred Dollars (\$14,300.00) in all, and for the further sum of One Hundred Dollars (\$100.00) per day from the date of filing of this bill of complaint to the date of final judgment herein, and for costs.

5. For such other, or further, or different relief as to the Court may seem meet, and in accordance with equity and good conscience. And your orator will ever pray, etc.

H. V. A. FERGUSON,
Of Counsel.

W. H. WITTY,
City Attorney of Pocatello.

State of Idaho,
County of Bannock,—ss.

Charles E. M. Loux, being first duly sworn, on oath says: I am the duly elected, qualified and acting Mayor of the City of Pocatello, a municipal corporation, the plaintiff litigant named above; I have read or heard read the foregoing bill of complaint, and know the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

C. E. M. LOUX.

Subscribed and sworn to before me this 16th day of January, 1909.

[Notarial Seal]

R. R. WILSON,
Notary Public.

My commission expires July 6, 1912.

[Endorsed]: Filed January 19, 1909. A. L. Richardson, Clerk. [62]

Exhibit "D" [to Answer to Amended Bill of Complaint—Demurrer to Bill of Complaint in City of Pocatello, etc., vs. Murray, etc.].

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Idaho.

IN EQUITY.

CITY OF POCA TELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name of the POCA TELLO WATER COM-
PANY, at Pocatello, Idaho,

Defendant.

DEMURRER TO BILL OF COMPLAINT.

The demurrer of James A. Murray, defendant, to the bill of complaint of the City of Pocatello, the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all of the matters and things in the said complainant's bill of complaint to be true in manner and form as therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth:

I.

That this Court is without jurisdiction of the subject matter of said bill of complaint, the same not presenting a cause for equitable cognizance.

II.

That said complainant in and by its said bill has not made or stated such a cause as entitles it, in a court of equity, to any relief against this defendant as to matters set forth in said bill, or any of said matters.

III.

That said bill is multifarious in that inconsistent causes of action *as* therein stated. The complainant sets forth [63] in said bill that James A. Murray has a franchise for the purpose of furnishing water for domestic purposes to the City of Pocatello, and that said Murray resides in the State of Montana; that the law of the State of Idaho provides that upon due and proper notice, every person furnishing water to cities and villages within the State of Idaho, shall appoint water commissioners for the purpose of determining rates, and that said Murray

refused to appoint said commissioners, and thereby became liable for one hundred dollars (\$100.00) per day penalty provided in said act. Plaintiff then prays for a money judgment for fourteen thousand three hundred dollars (\$14,300.00); also that the Court fix and promulgate reasonable rates and charges for the water furnished to complainant by the defendant; also that the Court appoint a receiver for defendant's water plant, and that plaintiff have general relief.

IV.

Said bill is also multifarious in that there is a misjoinder of causes of action, to wit:

(a) A cause of action in favor of the plaintiff and against the defendant to recover a money judgment for a penalty under the Idaho statute.

(b) A cause of action in equity to fix reasonable rates and charges.

(c) A cause of action in equity for the appointment of a receiver.

WHEREFORE and for divers other good causes of demurrer appearing in the said bill this defendant doth demur thereto, and humbly prays the judgment of this Honorable Court whether he shall be compelled to make any answer to said bill, and prays to be hence dismissed with his reasonable [64] costs and charges in this cause most wrongfully sustained.

D. WORTH CLARK,

J. R. A. BUDGE,

Said Defendant's Solicitors.

Residence and P. O. Address, Pocatello, Idaho.

Exhibit "E" [to Answer to Amended Bill of Complaint—Order Sustaining Demurrer to Bill of Complaint in City of Pocatello etc. vs. Murray etc.].

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday the 3d day of May, 1909.
Present: Hon. JOHN J. DE HAVEN, Judge.

No. 128—Southern Division.

THE CITY OF POCA TELLO, a Municipal Corporation,

vs.

JAMES A. MURRAY, Doing Business Under the Name of the **POCA TELLO WATER COMPANY**, at Pocatello, Idaho.

On this day was announced the decision of the Court upon the demurrer to the bill of complaint herein, heretofore argued and submitted, which decision is in writing and on file in said cause, and is to the effect that said demurrer be sustained and the bill dismissed and that the defendant recover costs herein.

Whereupon it is ordered that the demurrer to the bill of complaint herein be sustained, that said bill be and is hereby dismissed and that the defendant James Murray, doing business under the name of the Pocatello Water Company at Pocatello, Idaho, do have and recover of and from the City of Pocatello, a municipal corporation, the plaintiff, his costs and dis-

bursements expended in said cause taxed at the sum of \$16.40.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the Circuit Court of [66] the United States for the District of Idaho, do hereby certify that the above and foregoing is a true copy of the Judgment in said cause entered in the Judgment Book of said Court at page 177, Southern Division.

Witness my hand and the seal of said Court this 3d day of May, 1909.

[Seal] A. L. RICHARDSON, Clerk. [67]

Exhibit "F" [to Answer to Amended Bill of Complaint—Opinion in City of Pocatello etc. vs. Murray etc.].

United States Circuit Court, District of Idaho.

CITY OF POCATELLO,

Plaintiff,

vs.

JAMES A. MURRAY, as the POCATELLO
WATER COMPANY,

Defendant.

OPINION AND DECISION OF THE COURT.

1. Constitutional Law (sec. 128)—Obligation of Contracts—Contract with City.

“Where a city, having power to do so, entered into a contract with a water company, granting a franchise and fixing charges which might be made to consumers, and also providing the mode by which such charges might be changed from time to time

after a fixed term, such provision was a material part of the contract which could not be impaired or affected by a subsequent state statute providing a different mode of establishing rates generally.”

(Ed. Note.—For other cases, see Constitutional Law, Cent. Dig., secs. 372—379; Dec. Dig., sec 128.)

2. Waters and Watercourses (Sec. 203)—Jurisdiction—Fixing Water Rates.

“A court of equity is without power, at suit of a city, to fix the rates to be charged by a water company in the future, which is not a judicial function.”

(Ed. Note.—For other cases, see Waters and Watercourses, Cent. Dig., sec. 292; Dec. Dig., sec. 203.) [68]

In Equity. Suit by the City of Pocatello against James A. Murray, doing business under the name of the Pocatello Water Company. On demurrer to bill. Demurrer sustained.

W. H. WITTY and H. V. A. FERGUSON, for Plaintiff.

D. WORTH CLARK, for Defendant.

DE HAVEN, District Judge.

The questions arising upon demurrer to the bill have been ably argued by counsel for the respective parties, and have been fully considered by me. In order to clearly understand the questions involved, it is only necessary to say that the bill of complaint alleges, in substance, that the defendant is the owner, and in possession, of a system of waterworks in the City of Pocatello, under franchise granted to him by the city on June 1st, 1901, by a certain ordinance

numbered 86, alleged to be in full force and effect, and set out in the bill. This ordinance recites that the supply of water furnished the city—

“ . . . is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink Creek and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe, at a large additional expenditure of money; and

Whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that unreasonable or arbitrary changes shall not be made; and

Whereas, the demand of the said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the City of Pocatello to extend and give the assurance asked for”—

and then proceeds to name a schedule of water rates which the defendant was authorized to charge for a period of five years. The ordinance then further provides: [69]

“Sec. 3. The Foregoing rates and charges are hereby adopted by the City of Pocatello, by and for itself, and as trustee for the use and benefit of all private consumers of water within the corporate limits of said city, for a period of five years

from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water company shall exceed 5 per cent. above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'Schedule of Water Rates' of section 2 of this ordinance may be readjusted so as to yield not less than 5 per cent. above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section 4.

"Sec. 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section 3, and if the City of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained in the following manner, to wit: A committee of four experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers, shall be selected, two by the City of Pocatello, and two by the said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree, they shall select a fifth; and if they cannot agree upon a fifth, they shall request the president of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority

of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates, and such decision shall be final."

The five year period for which rates and charges were fixed by section 3 of the ordinance expired on June 6, 1906, and the bill alleges:

"That said schedule of rates and charges has ceased to be reasonable and proper, and is no longer a just measure of the amounts that ought to be paid by the plaintiff and the inhabitants thereof for water furnished to them under said franchise, in view of the growth and expansion of said city, and the inferior and unsatisfactory water service furnished by said defendant, and that said rates are now excessive, extortionate, and oppressive in each and every instance." [70]

It is also alleged that, under an Act of the Legislature of the State of Idaho, approved March 16, 1907, (Laws 1907, p. 555), entitled "An Act to Amend Section 2711 of the Revised Statutes of the State of Idaho, as amended by an Act approved March 9, 1905" (Laws 1905, p. 192):

"It is provided that the rates to be charged for water by all persons, companies, or corporations supplying water to towns, and cities, must be determined by commissioners to be selected as therein provided, to wit: Two by the town or city authorities, each to be a taxpayer of the given town or city, and two by the person, company, or corporation supplying water, the last two to be selected within thirty days after written notice of the action of the town or city, which said notice

shall have been given and made within ten days after the selection by the town or city of the first two commissioners"—

and in case the commissioners so selected cannot agree upon rates, then a fifth shall be chosen in the manner provided by the act and set out in the bill of complaint, and that the rates fixed by such commissioners are to continue in force for three years. The bill further alleges that, prior to the commencement of this action, the plaintiff made and appointed two commissioners under the act above referred to, that written notice of its action was given to the defendant, and that the defendant has failed and refused to name commissioners to act with those appointed by the plaintiff.

The prayer of the bill is, that court fix and promulgate reasonable rates and charges for water to be furnished by the defendant under his franchise to the plaintiff and its inhabitants—

“for the period of three years next ensuing from the date of the court’s order and judgment in the premises, and adjudge and decree that the same, as fixed, made, and promulgated, are just and reasonable, and that defendant be enjoined and restrained from making, fixing, or promulgating any other rate or rates, charge or charges, for water so to be furnished for said period of time, and from collecting or receiving any other or greater rate or rates, charge or charges, for water during said time.”

And it also prays for a judgment against the defendant [71] for the sum of \$14,300.00 for its past default,

“and for the further sum of \$100.00 per day from the date of the filing of this bill of complaint to the date of final judgment herein,”

as a penalty for defendant's refusal to appoint commissioners to jointly act with those of the plaintiff in fixing charges and rates for water under the above referred to statute of Idaho.

The defendant has demurred to the bill upon the ground that it does not state a cause of action entitling the complainant to any equitable relief, and also upon the ground that the bill is multifarious.

1. I do not deem it necessary to consider whether the bill of complaint is subject to the objection of multifariousness, as in my opinion the demurrer must be sustained upon the broad ground that the bill does not state a cause of action entitling the complainant to the equitable relief prayed for. The reasons for this conclusion will be briefly stated. The City of Pocatello, under its general power to provide the city with water, was authorized to contract with any person or corporation to furnish water for it and its inhabitants; and Ordinance No. 86, under which the defendant is furnishing water to the complainant and its citizens, constitutes a valid contract between the complainant and defendant. Sections 3 and 4 of that ordinance are a substantial part of that contract, and are for that reason not affected by the subsequent statute of Idaho of March 16th, 1907, amending section 2711 of the Revised Statutes of 1887 of the State of Idaho referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide

a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from [72] the recitals contained in the ordinance that these sections were inserted because the defendant desired

“To be protected against unreasonable or arbitrary changes in the rates and charges for water and water service”

before undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation upon the part of the City of Pocatello to pursue the mode pointed out in these sections in readjusting or changing the water rates named in the ordinance, an obligation which, under article 1, Sec. 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the State. The method which these sections prescribe for adjusting and fixing the charges to be allowed the defendant for water furnished by him, under the ordinance, cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant.

2. But I am further of the opinion that even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is furnishing water to the City of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, this Court would still be without

jurisdiction to fix and promulgate the water rates and charges, which the defendant shall have the right to collect, during the next three years, under his franchise. The fixing of such rates, when not a matter of contract,

“is a legislative or administrative, rather than a judicial function. *Reagon v. Farmers’ Loan & Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1062, 38 L. Ed. 1031. *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12. [73]

This is the general rule, and the fact alleged in the bill that defendant has refused to join with the complainant in naming commissioners to fix the rates which he shall be allowed to charge for furnishing water under his franchise, as provided in the statute relied on by complainant, is not sufficient to create an exception to the rule, and does not authorize the Court to extend its jurisdiction, and take upon itself the exercise of the ‘legislative or administrative’ power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years.

The demurrer to the bill of complaint is sustained, and the bill dismissed; the defendant to recover costs.

[Endorsed]: Filed Sept. 3, 1912. A. L. Richardson, Clerk. [74]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCA TELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY, and GEORGE WINTER,
Defendants.

Replication.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answer of the defendant, James A. Murray, doing business under the name and style of Pocatello Water Company, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in law to be answered unto, and that said answer of said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this; that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, all which matters and things the repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct and hum-

bly prays as in and by its said bill it hath already prayed.

P. C. O'MALLEY,
CLARK & BUDGE,

Attorneys for Complainant.

Residence and P. O. Address:

CLARK & BUDGE,
Pocatello, Idaho.

[Endorsed]: Filed Sept. 9, 1912. A. L. Richardson, Clerk. [75]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCA TELLO, a Municipal Corporation,
Complainant,

vs.

JAMES A. MURRAY, Doing Business Under
the Name and Style of THE POCA-
TELLO WATER COMPANY, and GEORGE
WINTER,

Defendants.

Opinion.

May 16, 1913.

D. WORTH CLARK and P. C. O'MALLEY, At-
torneys for Complainant,

N. M. RUICK and J. H. HAWLEY, Attorneys for
Defendants.

DIETRICH, District Judge:

The suit is brought for the cancellation of a fran-
chise, granted to the defendant June 6, 1901, and re-

lating to the furnishing of water for the use of the plaintiff and its inhabitants, as appears from its ordinance numbered 86. A copy of the ordinance is attached to the amended bill, and on its face, as well as from the averments of the pleadings, it is shown that at the time of its passage the defendant owned and was operating the system by which the City was supplied with water, under a former ordinance numbered 59 (passed June 8, 1898), which was in [76] favor of Pocatello Water Company, a corporation, and confirmed and continued in it as assignee certain rights and privileges theretofore conferred upon the defendant and his then associates, F. D. Toms, and John J. Cusick, by ordinance numbered 46 (passed January 4, 1892). The Pocatello Water Company later assigned all of its rights under both ordinances to the defendant.

The city contends that defendant has violated the provisions of Ordinance 86 in material respects, and for that reason seeks a decree relieving it from any further obligations thereunder. With one possible exception, the substantial defaults alleged and relied upon all relate to the adequacy of the amount of water supplied by the defendant, and the controlling question therefore is, whether the defendant has fulfilled his obligations in this respect.

In the main the city and its inhabitants are dependent upon the defendant's system. The Oregon Short Line Railroad company supplies its needs from a plant of its own, and there are a few private wells; and there has recently been constructed an open ditch, from which, by the use of pumps and other

devices, water may be procured for irrigation purposes in certain quarters. Other than the railroad supply, however, these exceptions appear to be unimportant, if not wholly negligible.

The water delivered by the defendant is procured from three small mountain streams, referred to in the record as Mink, Gibson Jack, and Cusick Creeks. The flow of the first named during the dry season of each year may be roughly stated as three cubic feet per second, of the second, as two cubic feet, and of the last, as a small fraction of a second-foot. A pipe-line about six miles in length, and with a theoretical capacity of approximately .75 of a second-foot, diverts water from Mink Creek and discharges it into Gibson Jack. Pipe-lines from Gibson Jack and Cusick Creek discharge into what is known as the upper reservoir, [77] which serves not only to impound, and thus to equalize, the supply of water, but also to free it from silt and other sedimentary matter. From this reservoir pipe-lines lead to the middle and lower reservoirs, which are connected by a pipe-line, and from both of which mains lead to the city distributing system, which, so far as appears, is of the usual type. The reservoirs are situate on the "bench" or *mesa* near the city, with a sufficient elevation to give ample pressure, and are substantially built. At the time of the passage of ordinance 86 no water was being used from Mink Creek, the pipe-line from that stream was built shortly thereafter, the latter the middle reservoir was constructed and the lower one was remodeled.

The water is used by the municipality for street

sprinkling and for protection against fire, and by the inhabitants, for domestic and manufacturing purposes and during the summer season for their lawns, trees, and gardens. Since the passage of the ordinance, as appears both from the United States census and other evidence in the record, the population of the city has about doubled, it now being approximately 10,000, and it is fair to conclude that the needs for which water is required have increased at least one hundred per cent. Admittedly the water is wholesome, and the supply thereof is ample except during the summer season, when large quantities are used for street sprinkling and lawns, and during that season there has been complaint nearly every year for the last nine or ten years. As early as 1905 it appears that the situation was thought to be so acute that the city officials, taking cognizance of criticism by citizens, and the public clamor because nothing was being done to compel the defendant to furnish a greater supply, called a mass meeting for the purpose of discussing ways and means of improving the conditions, and, if possible, of devising a remedy. In the year 1911 all the reservoirs ran [78] practically dry, and as a consequence the city was without adequate fire protection. Much bitterness prevailed, and finally, either as a result of a judicial proceeding, or of threats by the city authorities to commence such a proceeding,—it is not clear which,—an arrangement was made by which the management of the plant was temporarily taken out of the hands of the defendant's superintendent. With the exception of the small volume of water that may be stored in the

middle reservoir, the capacity of the system to supply the summer needs of the city has not been increased since the construction of the Mink Creek pipe-line. No meters have ever been installed, but "flat" rates are charged, in accordance with a schedule thereof incorporated in the ordinance itself.

The provisions of Ordinance 59 are not highly material to the present consideration. As already stated, it reaffirmed the grant of Ordinance 46, and it also established a schedule of water rates, and required the water company to substitute a steel pipe for the wooden flume by which the waters of Gibson Jack Creek were carried to the reservoirs. It contains nothing else of importance.

Ordinance 46 grants to defendant and his associates the right generally to lay pipes in the streets of, and to supply water to, the City of Pocatello and its inhabitants for the period of fifty years. Certain conditions are imposed:— (1) The grantees were to complete the plant and be ready to deliver water within a certain specified period: (2) The water supplied was to "be conveyed from the creeks on the Fort Hall Indian Reservation known as Mink and Gibson Jack creeks," and was to be "sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello," and was to "be of pure and healthful quality;" (3) The water was to be conveyed to, and confined in, "a suitable and substantial reservoir or reservoirs," at a point above the town, so as to [79] furnish a pressure of at least 150 pounds. The immediate laying of certain prescribed mains and laterals for the

distribution of water is required, and it is added that "thereafter main pipes and laterals may be laid as the occasion or consumption demands." There are no other material provisions.

Turning, now, to Ordinance 86, and analyzing it in the light of the conditions thus briefly sketched, what obligations does it impose upon the defendant, and has he substantially fulfilled them? In one aspect, the question turns upon the construction of the contract itself, the material facts being undisputed; and in another, upon the view which may be taken of facts touching which the testimony is, in its implications at least, highly conflicting. Undoubtedly the ordinance falls within the general rule applicable to grants of franchises, that where, upon a fair reading of the instrument, reasonable doubts arise as to the intent of the parties, such doubts must be resolved in favor of the public. *Stein vs. Bienville Water Supply Co.*, 141 U. S. 67, 80, 81. There is nothing in *Bellevue Water Co. vs. City of Bellevue*, 3 Idaho, 739, or *Jack vs. Village of Grangeville*, 9 Idaho, 291, to the contrary. One of the reasons generally assigned for the rule is that such instruments are usually drafted by able counsel representing the grantee, and strong internal evidence is not wanting that the present agreement was so prepared. But be that as it may, the rule of construction is so well established that the reasons upon which it rests need not be discussed.

The only provisions of the ordinance purporting to be onerous to the defendant, or to impose upon him obligations with which he was not already charged under pre-existing franchises, are found in a para-

graph of the preamble, which reads as follows: "Whereas the present supply of water furnished by said water system (the existing one) is deemed inadequate for the present and future need of said city (Pocatello), and said James A. Murray agrees to [80] bring in the waters of Mink Creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe, at a large additional expenditure of money."

The substantive part of the instrument is all beneficial to the defendant: It declares that his existing rights and privileges are confirmed and continued in effect, that the then existing water rates were fair and should not be altered for a period of five years, and then only upon certain conditions, and in the manner therein specified; that no other person or corporation should be granted a franchise upon more favorable terms; that the city itself should not construct or operate its own system in competition with the defendant, until it should have first in good faith offered to purchase his plant at a price to be fixed by a board of engineers in the manner expressly prescribed, the purchase to be made under conditions with which the city could not comply without the greatest difficulty, if at all; and that the city should rent, and pay for at the scheduled rates, at least forty-five fire hydrants. Sections 6 and 8, which doubtless relate to the paragraph already quoted from the preamble, are as follows:

"Section 6. Within ninety days from and after the passage and approval of this ordinance, the said

James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void."

"Section 8. If at any time the said James A. Murray, or [81] his successors or assigns, fails to supply sufficient water for the needs of the City of Pocatello and the inhabitants thereof, then it shall be optional with the City of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provisions of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply."

The agreement of the defendant to "make all extensions of street mains warranted by the growth of" the city, imposed upon him no new obligations; the duty so to do was clearly implied by Ordinance 46. Under it, as we have seen, the grantees were bound to furnish water to the city and its inhabitants, and they were given the privilege of laying

pipes in the streets for its proper distribution. Certain mains and laterals were deemed to be indispensable and immediately necessary, and these they were required to lay at once. As to other pipes and laterals which might have become necessary to enable them to fulfill their primary obligation of delivering water to the city and its inhabitants, the city waived the right of having them laid in advance of any actual need therefor, and consented that they might be provided from time to time "as the occasion or consumption demands." If, therefore, the city received any consideration at all for the onerous terms of Ordinance 86, it consisted solely and exclusively of such new obligation, if any, as was imposed upon the defendant by his agreement "to bring in the waters of Mink Creek"; and whether this clause does or does not create a new obligation depends upon whether we adopt the construction contended for by the city or that urged by the defendant. By the city it is said the defendant thus agreed to bring in all the [82] waters of Mink Creek, and by the defendant, only such portion thereof as might be reasonably necessary from time to time to supply the public needs. In any view that may be taken of the issue of fact touching the shortage of water, relative to which the evidence is conflicting, what, under this clause of the ordinance and upon the undisputed facts, is the defendant's position? Admittedly the pipe-line from Mink Creek is of a capacity little, if any, more than sufficient to carry one-fourth of the flow of Mink Creek, even in the low-water season, and therefore if his agreement

was to bring in all the waters of the stream he has in a vital matter substantially failed to perform. If, upon the other hand, in accordance with his contention, it be held that by this provision he was required to bring in only such water as was reasonably necessary, then the ordinance must be held to be ineffective and nonenforceable, for in that view it is wholly without any consideration whatsoever, a mere *nudum pactum*. Before it was passed the defendant, by virtue of Ordinance 46, stood expressly obligated to furnish water "sufficient to supply both the public and private use and purpose" of the city and its inhabitants, and to convey the same from Mink Creek, as well as Gibson Jack. Such a construction would therefore be fatal to the entire defense, for under it the ordinance becomes a nullity, and ineffective either to confer any right upon the defendant or in any respect to bind the plaintiff.

But it is thought that such a view of the meaning of the stipulation cannot be maintained. It is not to be presumed that either the city authorities or the defendant intended to perpetrate a fraud upon the public. It is conceded upon behalf of the defendant that the language of the ordinance is susceptible to the construction urged by the city. Indeed, it can hardly be controverted that such is the natural import of the language; the defendant agreed, not "to bring in water from Mink Creek," but to "bring in the waters of [83] Mink Creek." The stream is a small one, and it may be readily conceived that both parties were of the opinion that the entire flow was required to supply needs which,

if not wholly instant, were so near at hand that immediate provision should be made therefor. The phraseology is wholly inappropriate to convey the limited meaning for which the defendant contends; nor is the language in any other part of the instrument favorable to such a construction. There is no intimation that the necessary conduit was to be added to or increased from time to time as there might be need. Not only were the "waters of Mink Creek" to be brought in, but the construction of the pipe-line by which this result was to be accomplished was to be commenced within ninety days after the approval of the ordinance and carried "to effective and speedy completion without unnecessary delays, interruptions or discontinuances." Such language leaves no room for the theory that pipe-lines were to be constructed in installments at such intervals as the defendant might deem to be proper. Force is added to this view by the present strenuous contention of the defendant that the waters of Gibson Jack and Cusick Creeks not only were, at the time of the passage of the ordinance, but still are, more than sufficient to supply all of the plaintiff's needs. If that be the case, and if we adopt the defendant's theory of the meaning of the ordinance, it necessarily follows that the waters of Mink Creek never have been needed, and that therefore defendant never has been under any present obligation to construct a pipe-line, either large or small, and that he may at his option, without violating any of the rights of the plaintiff, tear up the line which he did build. It is reasonable to infer that one of the pur-

poses of the ordinance was to put at rest the question of the sufficiency of the supply, and to forestall and prevent just such a controversy as has here arisen, by definitely providing that the waters of [84] Mink Creek, which were admittedly sufficient for such needs as then existed or were likely to arise in the immediate future, should be made available and put at the service of the city. Moreover, in the light of experience, and of facts in the record, and of what other municipalities have been doing, such was the course dictated by prudence and reasonable foresight. It appears that the sources from which a gravity supply for the plaintiff can be procured are limited, and of these the streams hereinbefore named are the most desirable. Under the system of water appropriation which prevails in this State, rights of private individuals might be initiated and become vested in the waters of Mink Creek at any time. The city's present and future interests therefore demanded that any claim which the defendant at that time had the right to make or to initiate, to the waters of Mink Creek, should be perfected and protected by the construction of the requisite means for the diversion and application of the water to a beneficial use. It was competent for the city to contract for such protection, and its desire so to do, it is reasonable to presume, was one of the moving considerations for submitting to the conditions imposed upon it by the ordinance. The contention that it would have been against public policy for the defendant to have appropriated more of the public waters than was necessary to supply

the immediate needs of the city, and that therefore the construction of a larger conduit would have been a vain thing, is without merit. Under the law of the State an appropriator has a reasonable time to apply the water which he has appropriated, to a beneficial use, and if such rule may be invoked in the case of an appropriation for agricultural purposes it should, and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality. Besides, if not required for the immediate [85] necessities of the city, the appropriation could have been consummated and the right held intact by a temporary application of any surplus to other beneficial uses. Upon this branch of the case the conclusion is unavoidable that the defendant's failure to bring in and make available for the uses of the plaintiff the waters of Mink Creek constitutes a substantial breach of his contract.

It remains to consider whether, upon such breach, and in the light of the other facts of the case, the plaintiff is entitled to the relief prayed for. That under proper conditions equity will declare *forfeit* and cancel a contract of the character of that under consideration is well settled. *City of Columbus v. Mercantile Trust Co.*, 218 U. S. 645. *Farmers Loan & Trust Co. v. Galesburg*, 133 U. S. 156. *City of St. Cloud v. Water, Light & Power Co. (Minn.)*, 92 N. W. 1112. *Capital City Water Co. v. State (Ala.)*, 18 So. 62. *Grand Haven v. Water Works*, 57 N. W. 1077. *Water Co. v. Jackson (Miss.)*, 19 So. 774. *Palestine Water Co. v. City of Palestine (Texas)*, 40

L. R. A. 203. Ennis Water Works v. City of Ennis (Texas), 136 S. W. 512. Upon the other hand, forfeitures are not favored at the law, and a party seeking equitable relief must come into court with clean hands, and be willing to do equity. Bearing in mind these principles, we may briefly consider the issues of fact, and especially the general question of the sufficiency of the waters which the defendant has supplied. The most striking feature of this branch of the case is the meagerness of available data. Incredible as it may seem, it appears to be the fact that in the face of the more or less continuous complaint during a period of nine or ten years before this suit was commenced by the citizens and the city officers, of a shortage of water, no effort appears ever to have been made by the defendant to measure the amount of water he was actually delivering into the city. An experiment was made with the Mink Creek line soon after its construction for the [86] purpose of determining its capacity, which, if we assume that the pipe is always entirely free from obstructions, and that there are no leaks, should give a result approximately correct. The velocity of the flow was ascertained by putting into the water, a short distance below the intake, a harmless stain, and then observing the length of time required for the water so discolored to pass through the entire length of the pipe. Thus, having the size of the pipe and the velocity of the flow therein, it required only a simple mathematical calculation to ascertain the theoretical discharge, which, according to the testimony of the defendant's superintendent, who made

the experiment, was .78 of a second-foot. But of course it does not follow that such is the actual delivery, averaged during the season, or, indeed, at any given time, and especially when we consider the length of time which has elapsed since the pipe was laid. It is of sheet steel, the life of which under various conditions is uncertain, and is approximately six miles in length, with numerous laterals, angles and curves, and going over hill and down dale. Silt settles in the lower parts to such an extent that it is necessary at such points to maintain valves or gates through which at intervals the water may be "blown off" or wasted, in such a manner as to carry with it the accumulated sediment. Air valves are maintained upon the high points which must be opened and closed by hand, and, it seems, when many of these are open, the water will not flow through the pipe at all, and the opening of any considerable number greatly curtails the flow. Moreover, in a pipe of this character and of such length it would seem to be unavoidable that leaks should develop from time to time, and, with no means of measuring the actual intake and discharge from day to day, these might well wholly or at least for a considerable length of time escape discovery. It is therefore obvious that the actual discharge of the pipe never reaches the theoretical discharge, and at times is [87] likely to be only a fraction thereof. If the pipe at any point is half full of sediment the discharge will be proportionately curtailed, and it is apparent that nearly all the time the capacity of the pipe is thus measurably contracted, for in the nature

of things the process of blowing off cannot be continuous, but must be only at intervals, when the daily increment has resulted in a considerable deposit of silt. In fact the process of "blowing off," itself necessarily diminishes the serviceable capacity of the pipe to the extent of the amount of water so wasted. And the record leaves no doubt that the amount of the actual delivery is likely at all times to suffer some diminution by reason of leaks and open air valves. In view of these considerations I am inclined to think that the box measurements of the water discharged from the pipe into Gibson Jack Creek made by engineers acting for the city in the summer of 1911 are, while meager, the most accurate and reliable data which we have touching the actual capacity of the line, and I therefore find that the amount of water brought by the defendant from Mink Creek and commingled with the waters of Gibson Jack is .56 of a second-foot. True, it is sought to cast doubt upon the accuracy of these measurements by the suggestion that at the time they were taken some of the air valves in the line were open and that consequently the flow was materially impeded, but such a theory rests upon nothing more substantial than hearsay testimony on the part of the superintendent, which was to the effect only that he was informed that such was the fact; he had no knowledge thereof.

The only other measurement anywhere upon the system at any time was made about the time this suit was commenced, and covered all of the water coming into the defendant's reservoirs. The facts

pertaining thereto rest exclusively upon the uncorroborated testimony of the superintendent. He states that the pipe-line carrying the water from Gibson Jack Creek and discharging it into the upper [88] reservoir was left open, and the outlets of the reservoir were closed, and thereupon an observation was taken of the length of time required to raise the level of the water a certain distance. Thus having ascertained the length of time required for the discharge of a given volume of water, the discharge per second could be easily calculated. Assuming the measurements of the reservoir to be correct, and that the time was carefully noted, there could be no question of the practical accuracy of the result, which, as stated by the superintendent, was about 3.15 second-feet.

The testimony of the plaintiff's engineers tends strongly to show that when their measurements were taken in the summer of 1911 the total flow of Gibson Jack and Cusick Creeks, supplemented by the water brought from Mink Creek, amounted to 2.56 second-feet. But even if we should accept the figures of the defendant's superintendent as being fairly accurate, we are still without data of the most important character to enable us to answer the ultimate question whether an amount of water reasonably sufficient for the needs of the city has been actually delivered to consumers. During the trial it developed that ordinarily in water systems such as this there is an enormous loss through leakage in conduits between the source of supply and the point of use. The superintendent of the San Francisco

water system, called as an expert by the defendant, testified in effect that in his experience he had found such loss to be approximately fifty per cent. His testimony stands undisputed, and the record throws no light upon the question whether in this manner the defendant's system wastes more or less than this percentage. Service meters have never been installed, and therefore we are wholly without direct information touching the amount of water actually delivered to consumers, [89] and for want of measuring devices anywhere in the main or principal laterals we have no means of ascertaining even what quantity is delivered at the city limits. Indeed so far as appears no provision is made in the defendant's system for the detection of leaky joints, and therefore great loss might go on indefinitely without discovery. In the absence of data touching such loss it is apparent that whether we take the measurements of the plaintiff's engineers of the amount delivered into the upper reservoir, or that of the defendant's superintendent, or if we strike an average between the two, we are still wholly unable to make even a fair approximation of the amount actually delivered to consumers. Is the waste through leakage fifty per cent, as in San Francisco, where efforts are made to detect and stop the leaks, or is it sixty per cent, or twenty-five or forty—it is a matter upon which we can only guess or conjecture. With the record in that state, any deductions at all as to the sufficiency of the water supply would seem to be unwarranted, but if any such deduction were to be made, we should, for the want of a better or

more reasonable course, be under the necessity of assuming the loss by leakage to be approximately fifty per cent. Upon that theory, and if, as is reasonable to assume, the duty of water for lawns is no greater than for agricultural crops, the supply would scarcely be sufficient to sprinkle the lawns, which aggregate in excess of one hundred acres, leaving nothing for other uses.

Other factors necessarily entering into the calculation of the sufficiency of the supply are left in equal uncertainty. If the contrary were not here conclusively shown, it would be reasonable to presume the existence of a standard of usual consumption of water per capita approved by experience, [90] at least for ordinary domestic and municipal purposes, and exclusive of use for lawns and gardens, but the published data disclose the most astonishing diversity, and admittedly there is no recognized standard. As to the amount required for lawns, gardens and trees there is apparently no recorded experience at all, and except in so far as such use may be found analogous to the irrigation of agricultural lands the question is left almost entirely to conjecture. Definite and credible information is furnished touching the area of lawns and gardens watered from the defendant's system, but the testimony is strikingly conflicting as to the number of people who depend upon it for domestic uses. One fact is put beyond all peradventure: Justly or unjustly, the inhabitants of the city, with remarkable unanimity, entertain the view that during the summer season the water supply is radically deficient.

The fact is established by overwhelming evidence, and even two of the three citizens called by defendant for the apparent purpose of establishing a different view, upon cross-examination reluctantly made admissions strongly tending to corroborate the witnesses for the plaintiff. It is abundantly shown that to a degree lawns frequently became parched and trees lose a part of their leaves in the middle of the summer; and that during certain years for a considerable period of time the water has been entirely shut off from the city for several hours each day. To meet the apparent shortage, when it first began to be serious, the defendant, instead of enlarging the intake and bringing in the waters of Mink Creek as by his contract he was required to do, went to the expense of thoroughly equipping the system with what in the record are referred to as "reducers," a device by which the one-half inch opening from [91] the main into the service pipe of each consumer was reduced to one-fourth of an inch, and the two-inch goosenecks from which water was delivered into the city sprinkling carts were reduced to about one-half of an inch. Conceding his inability at times to maintain the required pressure for fire protection, and that during the summer season there is a measure of inconvenience and suffering for want of sufficient water, the defendant asserts that the shortage is due to a wasteful use, apparently not by all of the citizens, but by a small percentage thereof. There is, however, no substantial evidence of abnormal waste. Some waste there is bound to be where there are so many consumers, even under

a meter system, and it may be fairly assumed that where, as here, flat rates are charged, there is a much greater percentage of waste than where meters are used. Where economy in the application of water is unsupported by consideration of self-interest on the part of the consumers, the general tendency is of course toward liberality, if not extravagance, of use, and then there are always, in every community, people who, even to the injury of others, will waste when the waste is without cost to them. But the defendant having contracted for the flat rate system must be presumed to have contemplated such extravagance of use as is ordinarily and necessarily incident thereto. He agreed to furnish a sufficient supply of water under a system which he must have known is everywhere and always attended with a use less economical than where the charge is based upon the amount consumed. It must therefore be held that he anticipated that the more prodigal use would necessarily prevail, and assented thereto, and he cannot now be heard to say that he has fulfilled his contract obligation because, while the amount supplied is insufficient under the system with respect to [92] which the obligation was expressly assumed, it might be sufficient under some other system. I am not to be understood as directly or indirectly sanctioning the wasteful use of water; that is to be deprecated, and, if persisted in, should not only be condemned but appropriately punished. But we must consider conditions as they are, and not as we would like to have them to be. Unfortunately the flat rate system was contracted for,

and neither party can make the substitution of a better system without the consent of the other, and thus far negotiations to that end have been without result. While admittedly there is substantially no direct evidence of abnormal waste, it is contended that the implications from the testimony of hydraulic engineers called by the defendant are strongly to that effect. Incidentally it may be stated that testimony of a similar character adduced by the plaintiff strongly implies an insufficient supply. But it must be apparent that this so-called expert testimony, both of the plaintiff and the defendant, is of little weight. Admittedly there is no recognized standard of reasonable per capita consumption anywhere or under any conditions. It is also conceded that published experience of the amounts of water actually furnished to and consumed by municipalities fails to approach a reasonable degree of uniformity, and is therefore of little value. Indeed it is not pretended by the witnesses for the defendant that their opinions upon the per capita amount reasonably required are based upon actual use; and generally speaking, their views seem not to be in harmony with such experience as is disclosed by the reported data. They simply state to us what in their opinion the consumption ought to be. So far as appears none of these witnesses ever made or observed any systematic tests or [93] experiments whatsoever. One of them, the defendant's superintendent, measured the water which during the single season was consumed at his home in Pocatello, and another one, acting in like capacity for the company that supplies water to the town of Clarkston,

in the State of Washington, made a similar experiment. While they are all hydraulic engineers, that fact in itself implies no special fitness to judge of the amount of water required to irrigate a lawn or to supply the domestic needs of an ordinary family. Possibly the duty of water for such purposes may at some time be properly classified as a branch of the science of hydraulics, but plainly it cannot be so considered now, for the very good reason that in the absence of scientific data the subject cannot be classified as a science at all under any head, and in the absence of such data I see no reason for holding that an intelligent householder is not quite as well qualified to express an opinion touching the amount of water which he reasonably requires to supply the needs of himself and family as is an engineer, especially if the latter be not a householder. How, for instance, can an engineer speak with authority upon the question of the amount of water required for a lawn if both his books and his experience are absolutely silent upon the subject? While the two experiments, the one at Clarkston, and the other at Pocatello, are of some value, they are too meager, and the exact conditions under which they were made are too little known to entitle the reported results thereof to be accepted as a criterion. They were made by persons who were necessarily acting in the interests of water companies, not of consumers, and doubtless it is quite possible in an exceptional case to make a showing wholly out of accord with the results of everyday experience of consumers generally [94] who use water freely and yet

without abnormal waste. It must be borne in mind that the question is not how little water a family can get along with and survive; and while we should discourage waste we should not adopt a rule that would make the saving of water by the citizen the paramount object of his existence. People are accustomed to use water freely, and even where the meter system prevails the average man doubtless does not always stop to consider just how little water is absolutely indispensable for his bath, or wait until the grass begins to turn brown before sprinkling his lawn. Trees may be merely kept alive with much less water than is required for a luxuriant growth. Individual standards of sufficiency will doubtless be found to differ widely, and even under the meter system, where the incentives for reasonable use are the same with one man as another, what to one consumer may appear to be a generous supply will by another be regarded as wholly insufficient to cover his reasonable needs. Asserting waste as he does, why has the defendant not brought before us substantial and credible data of reasonable use? A controversy over the sufficiency of the supply of water has been going on more or less continuously for ten years, during the most, if not all, of which time the defendant has contended that there was waste in certain quarters, but, as has already been stated, not only has he failed to measure and record the amount of water he was actually delivering to the city from time to time, but, saving the experiment at the home of his superintendent, he has apparently never made any attempt, intelligent or

otherwise, to ascertain the reasonable duty of water in the plaintiff city. Upon the opening of the case my first impression was that the city and its inhabitants had been unwilling to give any [95] assistance in solving the problem, by the use of meters, and had obstinately resisted defendant's efforts to that end, but when the facts are all considered the contrary is shown to be the case. It being conceded, it must be, that generally during the summer season the defendant has in fact been unable to supply all reasonable needs, it necessarily follows that he must assume the burden of showing that the shortage in some quarters has been due to waste in others. In the exercise of reasonable prudence and foresight he must have anticipated that sooner or later, if he would relieve himself of responsibility for the shortage, he must produce satisfactory evidence of waste. Now so far as appears he has never contended, at least not until about the time this suit was instituted, that all or even the larger proportion of the citizens of Pocatello were wasteful in their use of water. In a letter dated October 1, 1907, his superintendent estimated that ten or fifteen per cent of the users were guilty of waste, and in regulations promulgated and published as late as the year 1912 reference is made to the waste of water by "some of the residents" to the detriment of others whose rights were of equal dignity. Here therefore were hundreds of consumers who were presumably making a reasonable use of the water. There were doubtless among them those who had large families, and others having small families, some having comparatively large areas of lawn and trees and others, small. Surely

out of all of these the defendant could have made fair selections, and, by installing meters, and thus, accurately measuring the water consumed by fifty or seventy-five of such representative patrons for two or three seasons, he could have furnished us with facts which would be highly illuminating, and without which we are left to conjecture and surmise. In like manner he could have measured the water [96] consumed by those who, he had reason to believe, were guilty of the most flagrant waste, and with such data we could possibly make some intelligent estimate of the extent of the waste. Clearly it was at all times within the right and power of the defendant to make such tests, if he so desired, without the consent and without regard to the wishes either of the city or its inhabitants; no one could have objected. Nor does it appear that anyone was ever disposed to object, or that defendant ever really desired that such tests be made. Some light is thrown upon his attitude by a letter written by his superintendent to a committee appointed by the mayor in the summer of 1905 to secure improved water service, and printed as a part of a pamphlet or open letter gotten out by the superintendent a little later. While in the communication itself it is conceded that at least "many" of the committee were personal friends of the superintendent, and therefore presumably not inclined to be unfair, their request that they be permitted to test the amount of water which the defendant proposed to measure to consumers, apparently to supply the amounts to which they were severally entitled under the flat-

rate schedule, was ridiculed and sarcastically declined. At various times, as early as 1905 and as late as 1911, apparently upon advice that he had the power so to do, defendant adopted and publicly promulgated rules to the effect that in every case of waste he would assume the right to meter future service to the offending consumer, but no meters were ever installed. The only reason assigned for not carrying such rules into effect is the difficulty in determining what amount of water the consumer is entitled to receive for the flat-rate charge, and therefore in determining when an additional charge may properly be made upon the assumption of excessive use. [97] But that is the precise difficulty we have here to meet, and with little, if any, more light upon the subject than was at all times available to the defendant. If, as already suggested, he had followed a rational course,—if he had complied with the request of the water committee above referred to, or if upon his own initiative he had installed a number of meters here and there, and made tests of the water consumed by those who admittedly were making a reasonable use thereof, he would have had, and we now would have substantial data in the light of which a line could be drawn with some degree of certainty between ordinary use at least, and flagrant waste. It further appears that while ostensibly the defendant was seeking the substitution of a meter system for the flat-rate system, he was in fact unwilling that such substitution should be made upon reasonable conditions. It is to be borne in mind that by virtue of Ordinance 86 a contract obli-

gation rested upon the defendant to furnish water at the flat rates therein provided for, and to furnish a sufficient supply. If, as we may assume, he found that the flat-rate system of charges operated badly and tended to a wasteful use of water, and thus increased the burden of his obligation, and if for that reason he desired the substitution of a more rational system, he should have consented to meter rates which would operate fairly both ways, but this he was apparently unwilling to do. Both his attitude and that of the city officers upon the subject are disclosed by two proposed ordinances, one of which he caused to be drafted and asked to have passed, and all the provisions of which he apparently insisted upon, and the other of which the city council indicated a willingness to pass. So far as appears, neither party had at the time any information or data from which there could be even an intelligent approximation of meter rates which, upon the [98] assumption of a reasonable, and not a wasteful, use, would be the equivalent of the existing flat rates. The ordinance proposed by the city purported to confer authority upon the defendant to install and maintain meters for the measurement of all water service, both public and private, "at reasonable rates and without distinction of persons." It contained some other conditions, which, however, added practically nothing to the then existing obligations of the defendant. Upon the other hand, the ordinance proposed by the defendant did not purport merely to cover the matter of substituting metered service for the flat-rate service, but contained several pro-

visions radically changing the relations of the parties in other material respects. The life of the defendant's franchise was to be extended, the right of the city to receive water for city purposes was to be modified, apparently to the disadvantage of the city, the minimum rate of interest which the defendant was to receive upon his investment was raised from five to six per cent, and an arbitrary valuation of six hundred thousand dollars was placed upon the plant, such valuation to serve both as a basis for fixing rates in the future and for the sale of the plant should the city desire to purchase. There were other provisions which it is unnecessary to specify in detail; sufficient has been said to indicate that the ordinance extended beyond the mere matter of substituting a meter system. It prescribed certain definite meter rates, but whether these were in themselves reasonable or unreasonable does not appear, nor does the record disclose their relation to the flat-rate schedule of Ordinance 86. But certain conditions were attached which were unreasonable upon their face. It was provided, for instance, that it would be optional with the defendant whether or not in the case of any [99] consumer a meter would be installed, and that in the event he should not see fit to install a meter, the consumer would continue to be charged at the old rates, thus leaving it within the power of the defendant to make discriminatory charges. And in that connection it was further provided that in no case should the minimum monthly charge for water delivered by meter measurement be less than the then existing flat rates. In other

words, with such an ordinance in effect the consumer might expect to have a larger rate to pay, but would have no hope of securing a lower rate, however economical he might be in the use of water. Such a proposition was clearly unreasonable. I do not mean to say that under a system of meter rates a minimum charge may not be reasonably made. A water company must connect up its system with the service pipe, install a meter, from time to time read the meter, and keep individual accounts,—services which are necessarily rendered whether the amount of water consumed be large or small,—and it is therefore entirely proper that a minimum charge should be made. But such minimum charges should be reasonable in amount, and they should also be uniform in their application, because such indispensable services are uniform in their burden. The inequitable operation of the provision here referred to may be illustrated. Under the schedule of Ordinance 86 the basis charge for a residence or private house is a dollar and a half per month; which was probably intended to cover kitchen supply, lavatory, etc., but if there be a bath in such private residence there is an additional charge of fifty cents, and if a water closet, another charge of twenty-five cents, so that the minimum charge per month for the ordinary residence with a bath and water closet is two dollars and twenty-five cents. Now, even if such [100] householder, with one bath and one water closet, should not use the amount of water which under the proposed meter rates he would be entitled to use for two dollars and twenty-five cents a month, he

must not only pay the two dollars and twenty-five cents but if, for convenience, he installs another bath tub, and uses practically no more water, and therefore imposes no greater burden upon the water company, he must still pay an additional fifty cents per month. That such a system of minimum charge is unjust seems too plain to require discussion, and the refusal of the city council to accept such a scheme and adopt the proposed ordinance does not signify a disposition to be unfair or unreasonable.

It is further said that in 1912 the defendant promulgated certain sprinkling rules and there was little, if any, complaint during that year of a shortage of water, and it is concluded that therefore the shortage in previous years is to be imputed to widespread waste. But such a contention is entirely devoid of merit. In the first place, no relation is shown between the assumed sufficiency of the supply in 1912 and these rules, and the conclusion is therefore a mere *non sequitur*. It does not appear that the rules were observed or enforced, and besides it is shown that during the critical months of July, August and September of 1912 the rainfall in Pocatello was three and seventy-four hundredths inches, as against one and eight hundredth inches for the same period in 1911. Apparently, therefore, to Providence rather than to the sprinkling rules should be ascribed the credit for such relief as prevailed in 1912. But in the second place the rules are not thought to be reasonable, and their enforcement could not therefore be recognized as a legitimate means of increasing the normal duty of an insufficient supply of water. [101] It must

not be assumed, that a rule of practice is desirable or justifiable merely because its observance will result in a saving of water; while water is valuable, it is not the only thing of value; nor must all other considerations give place to that of its conservation. Economy in the use of water, as economy anywhere else, is a relative term, and when the cost of saving a gallon of water is greater than the expense of bringing in an equal amount from an available source the saving is a relative waste, and any rule which imposes upon the plaintiff and its inhabitants a loss of time or of money, in saving water, financially greater than the outlay required to bring from an available source an additional supply should not and cannot be sustained. As we have already seen, the defendant some years ago reduced the apertures through which the water passes from the mains into the service pipes to a quarter of an inch. Now, consider that under the rules of 1912 the amount of water which, with a free flow, would pass through such a small opening was further cut down for lawn purposes by the requirement that, after suffering the loss of force or current necessarily due to friction in passing through the requisite length of hose, the water should be sprayed through a nozzle not to exceed one-fourth of an inch in diameter. Again, it was required that all sprinkling in the city must be done between the hours of six o'clock and eight-thirty o'clock P. M., so that, owing to the limited size of the mains, when the great majority of consumers were using water at the same time, as under such a regulation was bound to be the case, the pressure was

materially reduced, thus substantially diminishing the delivery into the service pipes. Add to these restrictions the most noteworthy [102] provisions of the rules, and that which is thought to be especially objectional, namely, the requirement that "the hose through which the water is supplied must be held in the hands of the operator while the sprinkling is being done," and we have a set of conditions which are thought to be highly unreasonable. I do not mean to say that under no conditions could such a regulation be permissible. Doubtless water can be more effectively applied by holding the hose in the hand than by the employment of any of the many patented sprinkling devices designed for the saving of labor and made familiar to us by their common use, and if all available water were being supplied, and the amount were barely sufficient to meet the needs of all, when applied in the most economical manner, such a stringent rule would doubtless be warranted; but we are not here dealing with emergencies or famine conditions. Or, possibly, if the consumer had the privilege of applying the water at any hour of the day and were furnished with a stream of sufficient volume to enable him to water his lawn expeditiously, the restriction might be tolerated. Here two hours and a half per day are by the rules allowed to the householder for watering his lawn. Presumably for the larger lawns at least all of this time is required, but if we assume that it requires upon the average only an hour and a half each day, an enormous amount of time in the aggregate is necessarily consumed. Now it is obvious that if the citizen could

draw three times the volume of water, he could do the required work in one-third of the time, and if the defendant is to be permitted to insist upon the highest possible efficiency for the water he furnishes, surely he must furnish it under conditions making its efficient application reasonably practicable; if he would benefit by rigid [103] economy of use he should share in the burdens necessarily incident thereto. According to the testimony of one of the defendant's employees, water is furnished for approximately eight hundred and fifty lawns, each embracing one or more lots. Assuming that it requires upon the average an hour and a half a day to water a lawn, it follows that each day while these rules are in force the inhabitants of the plaintiff city contribute the equivalent of 1275 hours of time for one man, to the conservation of water, or the whole time of more than 150 men, working continuously for eight hours each day, or, estimating such labor to be worth 25 cents an hour, the equivalent of \$318.75 per day, or over \$18,000.00 for a period of two months, which, upon a basis of six per cent, would cover the annual interest upon an investment of more than \$300,000.00. Clearly the necessity for such a waste of time would not exist if the defendant would bring in the available supply of water in Mink Creek, and would in part be obviated if the conduits by which the present supply is brought in and distributed, were of a sufficient capacity to enable consumers more quickly to procure and apply the amounts to which admittedly they are severally entitled. True, the calculation which I have made involves uncertain factors, and the result

is at best but a rough approximation, but it is reasonably conservative and fairly illustrative, and I am unwilling to assent to a policy which seems to have been persistently pursued by the defendant, as evidenced both by the reduction of the capacity of service pipes and the stringent sprinkling rules, of casting upon consumers the entire burden and expense of meeting a condition which he himself could obviate in whole or in part by a reasonable outlay expended in increasing the capacity of his conduits.

The further contention made by the defendant that his [104] contract imposes no obligation upon him to furnish water for gardens may be summarily disposed of. While the ordinance does not in terms expressly provide for the watering of gardens, either flower or vegetable, it is not to be presumed that when it was passed either party thereto contemplated that water would not be used for such purposes. Neither is there any express mention of trees, and if flowers and vegetables can be denied water, by a parity of reasoning trees must also be excluded. The schedule provides for "lawn sprinkling" at so much a "lot," and doubtless both parties contemplated such use as is ordinarily made of water upon town lots, which common observation teaches us to some degree embraces trees, flowers and vegetables. No more water is required to cover the cultivated part of a lot than an equal area in grass. So far as appears, prior to the commencement of this action no objection to such use was ever made, and the defendant delivered water and collected for it as for "lawn sprinkling." The long-continued practical construction placed upon an

agreement by the parties thereto is of great weight in construing its terms and should prevail here. Plainly the contention is a mere afterthought and is without force. My conclusion upon this branch of the case is that the supply of water furnished by the defendant has generally, during the summer months, been insufficient for the reasonable needs of the plaintiff city and its inhabitants.

Certain technical objections are urged against the maintenance of the suit, but they cannot be sustained. The stipulation in the ordinance to the effect that in case the defendant did not furnish a sufficient amount of water the City might bring in an additional supply was plainly not intended to be an exclusive remedy. Otherwise, immediately upon the passage of the ordinance, the defendant could have accepted it and then sat down and done nothing, and still could hold the [105] city to all of its agreements except the one by which it bound itself not to install a system of its own. Such a construction would render the contract both unreasonable and unconscionable. Now, as to want of notice, if it were true that prior to the commencement of the suit defendant had no warning of the plaintiff's intention to seek a judicial cancellation, the point would be immaterial. No obligation in law rested upon the city to give such notice, and there is nothing inequitable or unfair in the institution and maintenance of the suit. It is not a case where one party has permitted the other in good faith to assume that his acts of performance are satisfactory; the defendant had good cause to know, and did know for years, that the city claimed that he

was not fulfilling his obligations. Moreover, the record leaves little room for doubt that through the newspapers, if not otherwise, his superintendent had actual notice of a resolution passed by the city council September 7, 1910, declaring that he had failed to keep his contract, and giving him until April 1, 1911, for performance, in default of which the ordinance was to be held to be null and void. It is not pretended that the water system was in any respect improved subsequent to the date of this resolution, and the defendant has at no time, either before or after the commencement of this suit, offered to meet the plaintiff's demands.

The further objection that the suit is unnecessary, and that if the plaintiff's contentions are well taken the city could rescind by resolution is not one that defendant can successfully urge. The right of the city may be conceded, but the remedy is not necessarily adequate. Such a resolution would not be legally binding upon the defendant, and sooner or later, unless he were content to abandon the contract, the controversy would have to be litigated in the courts, where [106] only a final adjudication could be had, and until such judicial determination the rights of both parties would necessarily remain in doubt. It is therefore thought that the course pursued is the more orderly, and hence the preferable one. Finally, the suit was duly authorized. By regular resolution dated August 17, 1911, the mayor was directed to employ special counsel to take action in the courts against defendant for such relief as was available under the law.

Other points raised have been duly considered, but the discussion should not be further prolonged. The defendant having through a series of years persistently declined to carry out the plain provisions of his contract, and having failed to furnish a supply of water sufficient even for immediate needs, has forfeited his right to insist upon performance by the city; and the latter being free from fault is entitled to the relief prayed for. It is suggested that it is within the power of the Court to enter a conditional decree, providing that the contract shall be cancelled unless the defendant shall, within a reasonable time to be prescribed, comply with certain specified conditions. Assuming that such power exists, it is not thought that the case is a proper one for its exercise. The defendant has done nothing and made no outlay in excess of what was already required under the original franchise, and surely, if, as is confidently asserted by his counsel, the cancellation of Ordinance 86 will leave Ordinance 46 intact, to grant the relief prayed for will entail upon him no substantial loss or real hardship. By the Supreme Court of the State it has already been finally held that one of the material provisions of the agreement is no longer operative, and upon the whole I am inclined to think that no injustice will be done and the ultimate interests [107] of the parties will be best subserved if it is entirely dissolved. The record is not without abundant evidence that as between the parties there has for a long time been and now is a total want of mutual confidences, seemingly amounting to a temperamental in-

compatability, and in the absence of such confidence I am not inclined to undertake the onerous, if not hopeless, task of satisfactorily directing and supervising the performance of an agreement which, by reason of changing conditions and its continuing character, must ever remain executory. The relief prayed for will be granted; counsel for the plaintiff are directed to prepare a proper form of decree.

[Endorsed]: Filed May 16, 1913. A. L. Richardson, Clerk. [108]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCATELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCATELLO WATER
COMPANY, and GEORGE WINTER,
Defendants.

Decree.

This cause came on to be heard at Pocatello, Idaho, in the Eastern Division of the District Court of the United States for the District of Idaho at the March, 1913, term, the evidence being taken in open court before the Judge thereof, and at the conclusion of the taking of the evidence both parties having rested, said cause was by mutual consent and agreement of counsel transferred for argument, and the entry of decree to the Southern Division of the above entitled court sitting at Boise, Idaho, and was there argued

by counsel and submitted, and thereupon, upon consideration thereof, it was and it is Ordered, Adjudged and Decreed as follows, viz:

IT IS ORDERED, ADJUDGED, and DECREED that the contract and franchise Ordinance No. 86 referred to in the bill of complaint and attached as an exhibit thereto, being marked Exhibit "A," and being an ordinance entitled "An Ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray [109] for supplying said city with water for public and private use; fixing the rates to be charged for said water; providing a means of ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of a sale; and waiving the right on the part of said city to build, own or acquire a competitive water system, except under stated conditions, or of granting to others more favorable terms or franchise than that now held and granted to said James A. Murray," passed and approved by the Mayor and City Council of the City of Pocatello, Idaho, June 6th, 1901, be and the same is hereby cancelled, annulled, rescinded, held for naught and declared utterly void and of no effect, and the plaintiff, the City of Pocatello, a municipal corporation, is relieved from all obligations thereunder.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, James A. Murray, doing business under the name and style of Poca-

tello Water Company, has no rights or power under or by virtue of, or by reason of said Ordinance No. 86, or any of the terms or provisions thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the complainant have and recover its costs herein in the sum of Three Hundred Fifty-four and 70/100 Dollars.

Done in open court this 26th day of May, 1913.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed May 26, 1913. A. L. Richardson, Clerk. [110]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCA TELLO,

Complainant,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY, and GEORGE WINTER,

Defendants.

Statement of Evidence on Appeal.

This cause came regularly on to be heard on the 21st day of April, 1913, before Hon. Frank S. Dietrich, Judge of the above-entitled court. D. Worth Clark, Esquire, and P. C. O'Malley, Esquire, appearing as counsel for complainant; N. M. Ruick, Esquire, and James H. Hawley, Esquire, appearing as counsel for the defendants. The complainant, to sustain

the issues on its part, introduced the following evidence, to wit:

[Testimony of W. E. Moore, for Complainant.]

W. E. MOORE, being called and sworn, testified as follows:

“I live at 441 North Arthur Avenue, Pocatello; am a civil engineer and have been since 1908. I graduated in 1908 in civil engineering in Iowa State College, and since then have followed my profession, residing in Pocatello. I know the location of Mink Creek, Gibson Jack and Cusick Creeks.”

(Witness was here shown map marked for identification, “Complainant’s Exhibit 1,” and states:)

“I think the pipe-line from Gibson Jack to the upper reservoir is as represented on this map, but between Gibson Jack and Mink Creek I think the pipe-line as it is now cuts off some of [111] these curves in there instead of going around this way it comes straight across; I haven’t made a survey of it though in regard to alignment.”

(Complainant’s Exhibit No. 1 admitted in evidence. This exhibit and the others referred to are hereafter included in this statement.)

(Witness resumes:) “I took measurements of the water flowing in Mink Creek at the intake pipe-line of the Pocatello Water Company. The first time I was up there was August 21, 1911. I observed the pipe of the Pocatello Water Company conveying water from Mink Creek to Gibson Jack Creek at Gibson Jack Creek but not at Mink Creek. It was an eight-inch pipe, riveted steel. I took the water level at Mink Creek and the water level at

(Testimony of W. E. Moore.)

Gibson Jack Creek and estimated that the outlet from Mink Creek into Gibson Jack was perhaps seven or eight feet above the level. I mean the discharge pipe coming from Mink Creek. Between the intake at Mink Creek and the intake at Gibson Jack the difference in elevation was 80 feet; that is, the discharge was 80 feet lower than the water level of the intake. I was not in the valve-house. There the water level may have been above the level of the intake. I measured the water flowing in Mink Creek at the intake. I found 3.16 cubic second-feet there going to waste. I measured the water in the flume at Gibson Jack Creek and carried from Mink Creek, and it was .46 of a second-foot. I have figured the capacity of the pipe-line leading from Mink Creek to Gibson Jack at .71 of a second-foot. This is the maximum amount this pipe would carry. [112] I would say that my measurement of .46 second-feet carried in the pipe was correct within 10%. I think the pipe was that day carrying close to its capacity under conditions surrounding it at that time. I made measurements again on September 14, 1911, and found running in the pipe from Mink Creek to Gibson Jack .56 second-feet. This was correct within one per cent. The day before I was at Mink Creek and found 3.57 of a second-foot running. The fall between the intake at Gibson Jack and the outlet at its upper reservoir I estimated at 104 feet. I should say it was within two or three feet of that. There is a twelve-inch pipe running from Gibson Jack to the upper reservoir. This has

(Testimony of W. E. Moore.)

a carrying capacity of 2.74 second feet. It is a straight pipe. If it was crooked it would carry a less amount. On August 22, 1911, I found 1.63 second-feet flowing in Gibson Jack Creek and on September 14, 1911, there was 1.71 second-feet. At both times when I measured Mink Creek there was water flowing over an old rail weir there which I estimated to be about two and one-half second-feet but I did not measure it.

On September 13 I found 3.57 second feet in Mink Creek of which .56 of a cubic foot per second was discharged from the Mink Creek pipe-line into Gibson Jack. When I measured earlier in the season I found 3.16 second feet flowing in Mink Creek, of which .46 second feet was discharged into Gibson Jack. The measurement was August 21, 1911, in Mink Creek and August 22, 1911, I measured the discharge into Gibson Jack. On August 22, 1911, 1.63 cubic feet were flowing in Cusick Creek and on September 5, 1911, .05 was flowing there. Water does not flow from any other source than these creeks into the reservoirs of the Pocatello Water Company. On August 21, 1911, 2.14 second feet were flowing in the reservoir for the purpose of supplying the city with water, and at the September measurements that year 2.32 second feet were flowing. At the August measurements 3.16 were running in Mink Creek at the [113] point of the intake of the pipe-line. This was low-water season. The water is the lowest in that section in August, extending partly through September."

(Testimony of W. E. Moore.)

Cross-examination by Mr. RUICK.

I am twenty-nine years of age; graduated from the Iowa College five years ago this June; got my diploma as a civil engineer. I did not specialize in college in the branch of hydraulic engineering and never have. After leaving school I was in Chicago for a year and a half, then resided in Inkon and McCammon for fourteen months, and since May, 1911, have been a resident of Pocatello. While in Chicago I was rodman on the Chicago and Northwestern Railway terminal. I had no practical experience at that time in hydraulics. I left there to go into the employment of the Oregon Short Line in the capacity of instrument man. I was a level-man and transit-man, both, and my business was to practically lay out the work of the contractor and figure quantities. I was with the Oregon Short Line fourteen months. Am now assistant city engineer of Pocatello. Mr. J. P. Congdon was engineer when I first entered the employ of the city as assistant. Mr. Congdon now resides in Boise, Idaho. My duties as assistant chief engineer when I first came here was in charge of the work of sewer and sidewalk construction. Before entering the employ of the city of Pocatello, never had any connection with any irrigation projects nor since I left school had I up to that time any occasion to measure water or estimate the capacity of water conduits or estimate or measure the capacity of streams or the amount of water flowing therein. At school we had laboratory experience on weirs and also measured the quantity of water flowing in creeks

(Testimony of W. E. Moore.)

around there with weirs. This was part of the school course. I think this qualified me to compute the quantity of water flowing in the streams or water conduits. The first occasion I had to compute the quantity of water flowing in a stream after I left school was [114] when I went out to Mink Creek. Mr. Havenor was with me when I made these measurements, also another assistant by the name of Patterson. Havenor is now city engineer but was in private capacity at that time. Patterson was employed as chainman by the city. The first measurements I made were with Mr. Havenor, the second ones, Mr. Ashton, the former chief engineer of the Oregon Short Line, was with me. At the first measurements the valve-house was locked. I know nothing of its construction. There was a masonry dam with an old rail on top of it. At the intake on Mink Creek were steps on the lower side for the purpose, I suppose, of breaking the force of the water in its flow. The dam is complete without the rail. The water flows over the rail. I did not take the dimensions of the valve-house and cannot estimate them. I made my measurements just above the valve-house and made no measurements at that time of the water flowing into the pipes. We used a weir called the Cippoletti weir in measuring the water. This was made of a one and one-half inch board, thirty inches at the bottom and thirty-five at the top and the depth from the crest of the weir to the top was ten inches. The edge was beveled with the sharp edge up stream and we placed the weir in the water as nearly per-

(Testimony of W. E. Moore.)

pendicular as possible and constructed an earthen dam on both sides of it, made it water tight and the depth flowing over the crest of the weir was .52 of a foot. The width of the weir at the opening at the bottom was 2.51 and at the top 2.93 feet. We made our measurements by driving a stake about fifty feet back from the weir, and driving a nail in that until it just came flush with the water. I took a level and an elevation on the top of the crest of the weir and took the difference. We used in estimating the water the Francis formula. These measurements, I think, were accurate within two or three per cent. I did not take any measurements at the time of the water flowing over the rail of the dam that I considered accurate. We could have gone down stream and [115] measured the flow of the water there but we did not do it. It took us about three hours to make the measurements. I ascertained the dimensions of the pipe at the outlet of Gibson Jack Creek between Mink Creek and Gibson Jack Creek. There is about 33,000 feet of pipe-line I estimate. I did not inspect the pipe at more than one place between Gibson Jack and Mink Creek. If the pipe at the intake was eighteen inches in diameter I did not discover it as the valve-house was locked. I know nothing of the size of the pipe between these creeks except where it enters Gibson Jack Creek. We ran levels all the way from Mink Creek to Gibson Jack and found the fall to be approximately eighty feet. I got the length of the pipe-line approximately and the difference in elevation and the size of the pipe

(Testimony of W. E. Moore.)

and then estimated the velocity of the water from the fall and pressure and figured the quantity of water which the pipe would discharge under such circumstances, or the quantity if the pipe was a straight, smooth pipe. I used a standard formula known as the Chezy. I never had applied this before except in problems at school. I also measured the water being discharged from the pipe into Gibson Jack in a box. This was in September. The measurements I am referring to were made in August, and on the second trip I made there that month. The water conveyed from Mink Creek to Gibson Jack runs in a flume and into a lower valve-house similar to the one at Mink Creek. We measured the water coming out of the flume by placing a weir in the flume. The weir was simply a sharp board without any end contractions. We found the flow .46 of a second foot. This was August 22, 1912. We measured the water flowing in Gibson Jack Creek above the intake and above the point where the waters of Mink Creek come in, and found 1.63 second feet flowing. This was on August 22, 1913. We measured a point 180 feet above the intake from Gibson Jack Creek intake. I was there next on September 13, [116] and simply computed from the sum of the water in Gibson Creek and that flowing in Mink Creek into Gibson Jack that there was no water going to waste there and ascertained from that what quantity of water was entering the pipe-line and found it 2.14 second-feet. .05 second-feet was flowing in Cusick Creek and independent of that there was 2.09 second-feet. I found

(Testimony of W. E. Moore.)

the pipe leading from Gibson Jack Creek to the reservoir was twelve inches in diameter from a map in the office which so shows. I testify from the map in that regard. I did not observe the pipe itself except in one place where there was a wooden pipe we could not measure very well.

At the September 13th examination we practically did the same thing that we did on the August examination. Mr. Ashton and M. Congdon were with me in the September examinations. I do not know of other measurements made by Mr. Congdon or how he took other measurements but do not think this one was the one that he made his report on to the city engineer. I understand he took another and independent measurement before Ashton and I went up there with him. Ashton, Congdon, and I worked jointly on these measurements. We made no weir measurements of the water coming over the rail at Mink Creek, merely made an estimate. September 14th we made a box measurement at the valve-house in Gibson Jack. The box used was nine cubic feet and we made six trials in filling the box. I made no investigation of the flow of the water in Cusick Creek until September 7th. I am still assistant city engineer.

Redirect Examination by Mr. CLARK.

All of the water coming from Mink Creek to Gibson Jack Creek into the water system of the Pocatello Water Company, comes through the pipe-line that I have mentioned and [117] this is the only

(Testimony of W. E. Moore.)

source of supply for the city of Pocatello from Mink Creek.

[Testimony of William Ashton, for Complainant.]

WILLIAM ASHTON, being called and sworn, testified as follows:

I am fifty-three years of age, live at Salt Lake City, and am a civil engineer. Have been engaged in engineering for thirty years and have had occasion several times to measure water. Was at one time chief engineer for the Oregon Short Line and am now chief engineer for the Utah Railroad Co. On September 15th, with other parties, I measured the water flowing in Mink Creek above the intake of the Pocatello Water Company's pipe. One measurement showed 3.5 second-feet, another, 3.7 second-feet. Practically all the water at that time was passing by the intake and down the stream. There might have been a little diverted into the pipe. We couldn't get right to the pipe as the valve-house was locked. On the same day we went to Gibson Jack and took two measurements. One with a weir, then opened the spill-pipe and measured the water passing through that with a box. The first showed .52 second-feet and the other .56 second-feet. The box measurement was very close, the weir measurement might have fluctuated a little. We measured the water flowing in Cusick Creek by a dam and box holding one cubic foot and found the flow to be .05 of a second-foot. We measured the flow in Gibson Jack Creek above the intake of the Pocatello Water Company's pipe-line by means of a weir above the dam,

(Testimony of William Ashton.)

the head of the pipe-line and found 1.73 second-feet. A box measurement showed 1.95 second-feet. Knowing the different elevations, size and conditions of the pipe, one could figure its carrying capacity approximately. [118]

Cross-examination by Mr. RUICK.

I resigned my position as chief engineer of the Oregon Short Line in April or May, 1911, prior to this occasion I am testifying to. Since then I have had an office in private practice or for some other company I was working for.

While at Salt Lake I was requested by the city counsel to go to Mink Creek and look it over and came up here for that special business. Mr. Congdon was with me and Mr. Moore was with me once or twice. I think I spent two days on Mink Creek and two on Gibson Jack. The preparations were partially made one day but the measurements were not taken until the next. The purpose in having me go there was to find out if there was sufficient water in the streams to supply the requirements of the city. I think I was to some extent expected to ascertain the quantity of water actually being diverted by the water company. I was asked to look up a water supply for the city and recommend a place for obtaining it. After thoroughly looking the country over I concluded that the best supply was Mink Creek and Gibson Jack Creek. There was an abundance of water there for the city. It was my understanding that I was really employed to get data for a proposed municipal water system. My report cov-

(Testimony of William Ashton.)

ered my conclusions as to the best method of getting water to Pocatello, and in making it I availed myself of the data collected on these visits. [119]

I made a rough estimate on the flow of the water over the spillway of the headgate on Mink Creek, over the rail referred to by Mr. Moore. If I had been sent there for the purpose of ascertaining and testifying to the amount of water the company was actually diverting I would have made accurate measurements. The measurements I made above the intake were substantially correct. Those made below the intake were not intended to be very accurate; simply to get an idea as to whether it was about the same as what was flowing in the stream above. It wasn't my purpose to ascertain definitely the amount of water the company was diverting but the measurements I have indicate that substantially the same quantity was flowing over the rail as was flowing where I measured it, about 150 feet above the intake. The rail was 12 feet long, it was not perfectly horizontal and would not have been used for an accurate measurement. A thin sheet of water was passing over it. In making the measurements above we used a regular weir.

I gave my report to the city containing my findings as to what I considered the best method of obtaining additional water for the city.

Redirect Examination by Mr. CLARK.

When I said that Mink Creek and Gibson Jack were furnishing an adequate supply for the city I meant there was a sufficient supply available, not

(Testimony of William Ashton.)

that they were furnishing a sufficient supply at the time I made the investigation.

Recross-examination by Mr. RUICK.

I do not think I was called on to investigate the subject as to whether or not the city was furnishing a sufficient supply. [120]

[Testimony of Thomas F. Terrell, for Complainant.]

THOMAS F. TERRELL, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I am an attorney at law; reside at Pocatello—

Mr. RUICK objects:

I will state my objection. Upon the ground that it appears by the pleadings in this action that the City of Pocatello has itself repudiated the consideration upon which the equities of this bill are based, in that it has ignored the conditions of the ordinance binding the city to do certain things as a condition of the defendant Murray furnishing an additional supply of water to the City of Pocatello, and agreeing to extend the water system.

The COURT.—The objection will be overruled without prejudice to the ultimate consideration of the question when the record is made.

(Witness resumes:) A member of the bar of this court and the Supreme Court. In April, 1907, I was elected city councilman in Pocatello, assumed office the first Tuesday in May, 1907, and served for the two years ensuing. I was a member of several

(Testimony of Thomas F. Terrell.)

committees, among them the committee which carried on some negotiations with the water company looking to a settlement of the water question and relief from some annoying conditions. These negotiations were carried on through Mr. Winter and some I think through an attorney for the water company at that time. The principal differences between the water company and the city— [121]

Mr. RUICK.—We object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness and hearsay.

The COURT.—It will not be considered ultimately unless it is material.

Mr. RUICK.—It may be understood that our objection goes to all the testimony of this witness?

The COURT.—Yes.

(Witness resumes:) At that time, as I recall it, was a demand on the part of the city for an additional supply of water. The supply which was being furnished through July, August and perhaps part of September was not considered adequate by the people generally and by the council and committee acting for the council. The water company was requesting an ordinance permitting them to meter the service and the city was requesting that the company make extensions into certain districts that ought to have water for domestic use. Also requesting connection between the mains on the west side of the Portneuf River so as to furnish better service to the people in the northern part of the town and demanding better means of supplying water for sprinkling purposes.

(Testimony of Thomas F. Terrell.)

The street sprinkling during the summer of 1907 was being operated through some twelve or fifteen goosenecks. These were located at such point that it took more time to go back and forth to them than it did to distribute the water. The fire hydrants were about fifty in number, better distributed [122] than the goosenecks and better sprinkling service could have been given from them, which the city had claimed, but the water company had enjoined the use of the hydrants in an action in the District Court, I think. Sometimes it only took six or seven minutes to fill the wagons from the goosenecks, sometimes twelve or fifteen minutes and I understand it sometimes required thirty to forty-five minutes when lawn sprinkling was being done.

During this time several petitions were received from residents of different districts asking that city water be supplied them by means of extensions. The matter was brought to the attention of the water company and the extensions were not made. On July 26, 1907, a letter was sent by the fire and water committee to the Pocatello Water Company relative to the water situation.

Mr. CLARK.—I will ask you, Mr. Ruick, if you will produce the original of this letter, or permit us to use the copy. * * * It is the purpose to show the negotiation and the points of difference between the water company and the City of Pocatello.

Mr. RUICK.—For that purpose, and not waiving our general objection to all this testimony, we have no objection to the introduction of this document,

(Testimony of Thomas F. Terrell.)

and we will waive the question of its being a copy.

(Said letter marked Complainant's Exhibit No. 2.)

[123]

Mr. RUICK.—My associate, Mr. Hawley, suggests one added ground of objection. Unless the authorization of the fire and water committee to make these demands, or some subsequent ratification by the city of the action of the fire and water committee be introduced in evidence, then this will be subject to a motion to strike out, inasmuch as it does not appear that the fire and water committee had any authority to act for the city in the premises.

Mr. CLARK.—I think that we shall connect that, your Honor.

Mr. RUICK.—We make that additional objection, with a view of moving to strike out if you don't make the connection.

Objection overruled and letter considered read for the purpose of the record. (See attached pages, 9-a-b-c.)

(Witness resumes:) A letter dated October 3, 1907, written by you, addressed to the fire and water committee is to the effect that if the council would grant to the water company a meter ordinance it was thought the other differences could be amicably adjusted. This letter was the basis of future council meetings action on the meter question. [124]

[Complainant's Exhibit No. 2—Letter, Dated July 26, 1907, Fire and Water Committee to Pocatello Water Co.]

City of Pocatello.
Office of

Pocatello, Idaho, July 26th, 1907.

Pocatello Water Company,
Pocatello, Idaho.

Gentlemen:—

Your favor of the —— inst. referring to the water situation in the city of Pocatello, was read and considered by the City Council of the city of Pocatello, at its last regular session, and was referred to the Fire and Water Committee with instructions to make upon the Pocatello Water Company the following demands, to-wit:

1st. We demand on behalf of the people of the city of Pocatello that the new mains and works on the west side of Portneuf River be connected to and with the present water system of the city, with all reasonable diligence.

2nd. We demand that provision be made for bringing into the city of Pocatello, through your water system, all of the flow of waters in Gibson Jack and Mink creek, in low water season, within twelve months from this date.

3rd. We demand that extensions of the water mains and service pipes within the corporate limits of the city of Pocatello, be made when and where the residents of any block or section of the city petition

the water company, agreeing to take water at the established rates, when the aggregate amount of such rentals offered to be paid, will pay the Water Company six per cent upon the investment necessary to make such extensions.

In making these demands the Fire and Water Committee deem it a proper courtesy due to the Water Company to give [125] some of the reasons and the motive which actuated the City Council in taking the action above mentioned.

It was the unanimous sense of the City Council that the people of the city of Pocatello were not receiving, and for some years past have not received, the water service to which they were entitled, either for public or private use, considering the rates which are paid, and the further fact that it is within the power of the Water Company to give a better service if it will.

It is a matter of common knowledge that annually, during the months of July, August and September, for the past five or six years, the troubles of the present season have occurred in more or less aggravated form. While during the present season there ought to be plenty of water on account of the heavy snowfall of last winter, yet the situation is more acute this season than any of the past, and will continue to grow more dangerous and menacing from year to year. This is due to the fact that fortunately our city has grown very rapidly within the last five years, practically doubling its population within that time, while the Water Company has done practically nothing to increase its capacity or to utilize its re-

sources to meet the growing demands of the city. The City Council appreciates the fact that the Water Company, during the last few years, has made improvements looking toward the betterment of its system, but none of these improvements have had in view the increase in the quantity of water required by the city, and have, therefore, given but little, if any, relief from the annual bickerings and strife between the citizens and taxpayers on the one hand and the Water Company on the other, growing out of inadequate service.

The Water Company has been petitioned time after time, to extend its mains along certain streets where there [126] were more than sufficient residents who would take water at the established rates to pay interest on the investment necessary to make such extensions, but the Company has failed and neglected to make such extensions for the obvious reason that its capacity was already taxed to its limit in low water season, and to add consumers would only aggravate the situation.

During the present month the Water Company shut off the valves controlling the flow of water through the standpipes which furnish the water wagons for street sprinkling, so that it required from fifteen to forty minutes (depending on the time of day) to fill a 600 gallon tank. The result of this was, that while the city was paying to the Water Company something like \$3000.00 annually for street sprinkling and \$4000.00 to contractors to do the sprinkling, it required so much time to fill the sprinkling wagons, that the city was practically with-

out street sprinkling, although the taxpayers were paying about \$7000.00 for that comfort. The only solution of the action of the Water Company in shutting off these valves and reducing the flow of water for street sprinkling purposes, your letter to the contrary notwithstanding, is that the Water Company does not have a sufficient quantity of water to give good street sprinkling service, and at the same time meet the other growing demands upon your plant. In other words, the City Council feel that you have contracted and sold more water than the present capacity of your plant will deliver, with the inevitable result that all patrons of the company receive inadequate service.

As a result of your failing to deliver a reasonable quantity of water for street sprinkling, the City Council directed the sprinkling contractor to take water for street sprinkling from the fire hydrants, where a 600 gallon tank would fill in from three to five minutes, as against from fifteen [127] to forty minutes from the standpipes, where you required the water for sprinkling purposes to be taken. You filed an action to prevent the use of the fire hydrants for street sprinkling service, which suit is still pending and will be contested in the courts in due time.

During the last five or six years, with this trouble recurring annually between the Water Company and its consumers there has been constantly flowing over the Company's dam in Mink creek or Gibson Jack creek, or both, in low water season as much or more water than was being delivered into the City

of Pocatello. The City Council are informed and believe that all of this water wasting over the Company's dams, belongs to the Water Company, by purchase from the Shoshone and Bannock Indians, before such water and adjacent lands were ceded by the Indians to the United States and opened for public settlement and entry. In other words, that you are the owner of all of the surplus waters of Mink creek and Gibson Jack creek, wasting over your dams in low water season, and have the right to bring all the waters of said streams into the city of Pocatello for public and private use; but, notwithstanding this right, you have suffered these waters to waste over your dams, while the people of Pocatello are unable to obtain sufficient water to maintain lawns and trees, or adequate street sprinkling, except under onerous, unjust and burdensome rules and regulations, and are unable to obtain any extensions of mains to districts that are entitled to the use of city water.

There is but one permanent and substantial solution of this vexing and ever present water question, and that is to bring all the waters of Gibson Jack creek and Mink creek into the city of Pocatello, in low water seasons. This being done, the other questions of connections and extensions will [128] undoubtedly solve themselves. Unless this water is brought into the city the troubles of the present and past will continually arise to harass and annoy the people and breed discontent and bitterness toward the Water Company.

The City Council prefer to have an amicable ad-

justment of these matters, and avoid litigation if possible, hence, this demand is first made upon you looking to that end; but, upon the other hand, it has reached the conclusion that these questions are of paramount importance and should be dealt with now, upon friendly terms, if possible, or in the courts if necessary. In the meantime the city will not pay anything for the service it now receives, unless compelled to do so by the courts; and the rates charged to private consumers are much higher than they should be for the service received; and unless some proper steps are taken to afford permanent and substantial relief, steps will be taken to readjust the rate to a scale commensurate with the service given.

The City Council think that it is to the interest of the Water Company to avoid friction between it and its consumers, if possible, especially when the demands of the people are just and reasonable, and are such by which the Water Company will not only profit by it in the end, but will promote a friendly feeling between it and the people indefinitely. The citizens of Pocatello are willing to pay a fair water rate for a fair water service, and they are entitled to such service when it is within the power of the Water Company to give it. If the Water Company is not willing to give this service, the rates ought to be cut down to the value received of the service received, or else the Water Company ought to forfeit its franchises and turn them over to some one who will utilize the resources at its command to give a reasonable and efficient [129] service at reasonable rates.

The City Council feel no bitterness or animosity toward the Water Company, and have not taken this step with a view to punish or harass the Company, but do so with the sole view of obtaining for the people, what the Water Company ought in good conscience to give.

Very respectfully,

FIRE AND WATER COMMITTEE.

By _____,
Chairman. [130]

I am not prepared to say definitely that there was a meeting with Mr. Winter and the mayor in my office regarding this matter or what took place there, except the general purpose of negotiating for a settlement of these differences.

After the committee was advised that if a meter ordinance was passed the other differences would be adjusted, on October 15, 1907, the City Council and mayor had a special executive session and formulated a proposition for an adjustment of these matters. That is a carbon copy of the minutes of the council.

(Said document was marked Complainant's Exhibit No. 3, and offered in evidence.)

Mr. RUICK.—It is objected to on the ground that it is incompetent, irrelevant and immaterial.

(Exhibit admitted by the Court with the understanding that it would be stricken out unless connected in some way, or followed by proof that it was served upon the water company.)

(Witness resumes:) I have no personal knowledge of its actual service on the company. I have a letter dated October 17, 1907, from the Pocatello

(Testimony of Thomas F. Terrell.)

Water Company in which it accepts service of this resolution.

(Said letter was marked Complainant's Exhibit No. 4.)

I believe the signature is that of Mr. George Winter, superintendent of the Company.

(Signature admitted by Mr. Ruick and letter admitted subject to general objection.)

Sometime in November an ordinance permitting the [131] company to install meters upon condition that they would make the improvements and meet the demands of the council was served upon the company to know if it would be satisfactory and if the differences could be settled if the ordinance were passed.

(Said document was marked Complainant's Exhibit No. 5.)

(Mr. Ruick asks the privilege of questioning before objecting and witness replies:)

All the negotiations referred to in the correspondence and my testimony were with a view of accomplishing a settlement of the water question; in a way, a give-and-take proposition. Not mutual demands; the demand, I think, originated on the part of the city.

Mr. RUICK.—I want to object to it on the ground that this correspondence all relates to an effort to compromise the matters of difference between the City of Pocatello and the defendant water company, and therefore for that reason it is incompetent, ir-

(Testimony of Thomas F. Terrell.)

relevant and immaterial. I just simply make that added objection.

The COURT.—It may go in subject to the objection.

(Witness resumes in reply to direct examination:)
The council prepared this ordinance, served it on the company, proposed to pass it if satisfactory to the company and the company would bring in additional water supply and meet the other demands of the city as denoted in the letter and the minutes of the executive session. I think that details the position of the council and the demands it made on the Water Company.

Mr. RUICK.—If the Court please, we want to interpose an objection, [132] and take special exception to the conclusions which this witness is drawing or seeking to draw as to what the purport of these papers is.

The COURT.—Yes, in so far as the witness has testified to that, the objection is sustained.

Mr. RUICK.—We move to strike that from the record.

The COURT.—The motion is allowed. It is pretty hard to disentangle it sometimes, but it will not be considered by the Court.

(Witness resumes:) My recollection is that this proposed ordinance was served upon you as attorney for the Water Company, you agreed to submit it to the company, see if it was satisfactory and advise the committee. The matter hung in that shape for several months without any answer from the com-

(Testimony of Thomas F. Terrell.)

pany. The ordinance was prepared in November and shortly after the weather was such that the improvements in contemplation couldn't well be made. Nothing was done until next spring, when the company presented to the council an ordinance attached to a letter dated June 10, 1908.

(Said letter was marked Complainant's Exhibit No. 6, and said ordinance was marked Complainant's Exhibit No. 6½.)

(Signature of Mr. Winter on Exhibit No. 6 is admitted by Mr. Ruick to be genuine.)

(Exhibit No. 6½ offered in evidence.)

Mr. RUICK.—If the Court please, in addition to the general objection to the testimony of this witness, we make to the introduction of this document the same objection [133] we made, that this is a part of the negotiations looking to a compromise and settlement of mutual differences.

The COURT.—It may be received, subject to the objection.

(Witness resumes:) After this ordinance was presented to the company the council named special committee to meet the company, discuss it and see if some settlement couldn't be made for the following. A number of objections to the ordinance were discussed and Mr. Winter asked that they be put in writing.

I believe the date of the letter, transmitting the ordinance to the council should be May 10th instead of June 10th. The reason I think so—

(Mr. Ruick objects to witness giving reasons as

(Testimony of Thomas F. Terrell.)

incompetent. Witness allowed by the Court to proceed.)

(Witness resumes:) The objections to the provisions of the ordinance were put in writing and given to Mr. Winter. I have a carbon copy of these objections, dated May 25, which I think is the correct date as the certified copy was certified May 25.

(Document marked Complainant's Exhibit No. 7.)

(Counsel for defendant submits that the letter in question was sent with an amended proposal. Exhibit 6½ should follow Exhibit 7. Mr. Clark introduces second ordinance.)

(Document marked Complainant's Exhibit No. 8.)

(Witness identifies Exhibit No. 8 as a certified copy of the ordinance, to which objections were filed.)

(Exhibits 7 and 8 offered in evidence. The same general objection by Mr. Ruick and the same ruling by the Court.) [134]

(Witness resumes:) The city council refused to pass either the original or amended ordinances—Complainant's Exhibits No. 8 and No. 6½. The objection served applied partially to the amended proposed ordinance—not entirely.

While I was connected with the council there was more or less trouble all the season, but after the refusal to pass the ordinances there was nothing done in an organized way, no record that I know of anything kept.

I have lived in this country twenty-two years and have had occasion to visit Mink Creek a number of times,—have seen it practically every year, with two

(Testimony of Thomas F. Terrell.)

exceptions, for the past fifteen years. The water company has not diverted all, nor any considerable part, of the water of Mink Creek for the purpose of *supply* the city during any of that time. The waters flowing in Mink Creek commingles with other waters from tributaries below and part of it is utilized for irrigation along the Portneuf River and part of it flows into the Portneuf River.

(Letter of October 3, 1907, addressed to fire and water committee, signed by D. Worth Clark, marked for identification as Defendant's Exhibit No. 1.)

[Testimony of J. C. Reynolds, for Complainant.]

J. C. REYNOLDS, duly called and sworn as a witness on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at 530 North Grant, Pocatello; as a civil engineer, graduated at Armour Institute, Chicago, in 1910, and have followed the profession since.

In July, 1912, I made a survey of the city of Pocatello to ascertain the number of acres of lawn and garden irrigated from the water system. We used a chain in making the survey, cut out all buildings and measured just the portions that were watered. There was about seventy acres of lawn and [135] thirty-three acres of garden; about one hundred and three acres in all.

Cross-examination by Mr. RUICK.

I graduated in the department of civil engineering in 1910 from Armour; was in Nevada three months; a little over a year at Inkom and McCammon and the

(Testimony of J. C. Reynolds.)

rest of the time in Pocatello. I was with the railroad in Inkom but left in August, 1911. The city engineer, Mr. Havenor, employed me to make this survey in July, 1912.

Mr. RUICK.—At this time, your Honor, we move to strike out this testimony as not responsive to the pleadings, and incompetent, irrelevant and immaterial. This suit was filed in 1911, and that raises the question whether or not the conditions in July, 1912, would be competent for any purpose as showing failure on the part of the water company to live up to its contract, without a supplemental pleading.

Mr. CLARK.—It will be competent, your Honor, if we show that the conditions in 1912 were approximately the same as they were in 1911.

The COURT.—Yes, it will be necessary to show that, though.

Mr. CLARK.—I will say to the Court now that I will promise to show that.

The COURT.—The motion is denied.

(Witness resumes:.) I was assisted by Glenn Bateman and Jack Rogers as chainmen. My instructions were to check up the land [136] irrigated from the water taps of the Pocatello Water Company. I did not have the names of the patrons of the water company; the hydrants adjoining the irrigated land were used as a basis. We went from yard to yard, as we found a hydrant in the yard we checked up the lawn, reduced it to acreage, also, the garden. We always asked whether the garden was watered or not but did not take the say so of the people always. If

(Testimony of J. C. Reynolds.)

the garden was in good condition we concluded that it had been watered and based our estimate of the area of garden irrigated upon that supposition. I have had no experience in agriculture in irrigated regions and not a great deal of knowledge of the science of irrigation. I have had no practical experience in irrigation in the arid regions. I computed the area of the gardens being watered by what I saw and what people told me. We chained the garden in making measurements and measured only that upon which crops were growing in 1912. We went on the assumption that people in whose yards the water tap was located were patrons of the company and had a right to the water. I do not believe we ascertained from the people whether they were really patrons or not, and we did not have any information from the water company. We usually relied on the condition of the yard. If there was a hydrant in the yard we went on the assumption that they were getting water from the company. We simply computed the area of such portions of the yard as showed that it had been irrigated. We turned in our report to the city engineer's office. I have a copy of it here.

Redirect Examination by Mr. CLARK.

We made an investigation in each instance to see if there was any other source of water supply, and only computed such lawns and gardens as appeared to have no other source of water supply except the tap in the yard. [137]

[Testimony of Theodore Turner, for Complainant.]

THEODORE TURNER, a witness duly called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I live in Pocatello and have for about twenty years; am an abstractor, real estate and loan business. I have served as mayor and am now mayor-elect—

Mr. RUICK.—What years?

April, 1901, until May 1902. I was mayor at the time the ordinance granting a franchise to the Pocatello Water Company was passed and approved, the one that is now in force.

Q. Did you have occasion during the year 1901 to ascertain approximately the amount of water which the city was receiving at about the time this ordinance was passed?

Mr. RUICK.—We object to any testimony going back and relating to conditions prior to the enactment of Ordinance No. 86, which is pleaded in the bill of complaint as the basis of this action, as incompetent, irrelevant and immaterial.

(Last question read. Mr. Clark adds:)

Q. From the plant of the Pocatello Water Company?

Mr. RUICK.—That is incompetent, irrelevant and immaterial.

The COURT.—It is claimed that you agreed to bring in an additional amount of water. I suppose the purpose of this is to show that the agreement has not been complied with.

(Testimony of Theodore Turner.)

Mr. CLARK.—That is exactly it, your Honor.

The COURT.—The objection will be overruled.

(Witness resumes:) At about the time this ordinance was passed, along in May, 1901 and at different times during the summer measurements [138] were made in company with Mr. Roeder and others. I understand the measurements of water to some extent and can approximate the amount flowing in a ditch or conduit. In the early part of the summer there was approximately two second-feet coming to the city, and that diminished during the latter part of the season. In 1911 I made an estimate in company with citizens here and found 2.3 second-feet flowing into the upper reservoir; this is the reservoir into which all water delivered to the city by the company flows. This amount has been increased since approximately three or four tenths of a second foot. The waters of Mink Creek have not been brought to the city, to my knowledge, since this ordinance was passed. I have seen Mink Creek at the company's intake on several occasions. There is a considerable body of water flowing there.

In 1911 there was not a sufficient supply of water furnished the city, in my estimation. I am a consumer of water and during the months of July and August I received little, and a great portion of the time, no water at my residence. Mr. Fargo, Mr. Jessc Budge, Mr.— I don't recall the other name—and I went all over the city, inspected the lawns, went into the house and turned on taps to see what the supply of water was. The pressure was slight, water

(Testimony of Theodore Turner.)

came slowly and all the lawns, with two exceptions, showed a lack of proper irrigation. Toilets in many of the houses could not be flushed.

During the irrigation season of 1911 I called on Mr. Winter in company with a number of men. We were there for two hours or more, I can't recall all Mr. Winter said. The gist of the matter was he would handle the water situation as he thought best. Mr. Winter, in reply to a remark of Mr. Martin's reminded him that he had said some year or two before when a member of the city council that the city would never get the water, [139] question settled until it was settled in court and told Mr. Martin he had better go to court and get it settled. After another exchange of words Mr. Winter stated to Mr. Martin that he thought they were having trouble then but their troubles were just commencing, and if something was done, which I think Mr. Martin had suggested, he would turn the water, I think he said, down the canyons into the river. There was no conclusion, no settlement was reached, no plan of settlement was even reached. The persons who went dropped away one by one, and finally we all went away without having accomplished anything whatever.

During the months of June, July, August and September for the past ten years, as a rule, there has been a shortage of water and lawns and gardens have suffered. Some years when there was an abundance of snow in the hills, and the spring was late and other conditions favorable, there was not so much suffer-

(Testimony of Theodore Turner.)

ing as in other years, but as a rule the water supply during July and August has not been sufficient to meet the demands upon it.

At the time the ordinance was passed the population of Pocatello was about 5,000, the 1910 census shows 9,100; there has been a considerable increase since 1910; there are more than 10,000 now, I believe. New houses have been built and the city has been steadily growing.

Cross-examination by Mr. RUICK.

We made the examination of the lawns in August, 1911. I recall James H. Wallis, State Pure Food Inspector, required something of the water company in the way of cleansing its reservoirs. We made our inspection some fourteen to twenty days, I think, after he made his order. I think we made our inspection at a time when water conditions were the worst and if the lawns had suffered as a consequence of the reservoirs being empty they would naturally show it. At that time the lawns appeared to have [140] been in need of water for some time. The pressure was low.

Redirect Examination by Mr. CLARK.

There had been a shortage of water prior to the time Mr. Wallis came to the city; I presume the city authorities had requested him to come down on that account, but I don't know. He came while the water situation was acute and made an order requiring the company to cleanse the reservoirs. I don't know the condition of the middle and lower reservoirs.

(Testimony of Theodore Turner.)

The upper reservoir contained silt and mud, eighteen or twenty inches deep. I saw it a number of times but inspected it only once. At times there would be a little water; at the time I inspected it there was practically none at all. The employees of the company were cleaning it out.

I believe I was there both before and after the order made by Mr. Wallis. The first of June the reservoirs were full but it kept diminishing and diminished very rapidly the latter part of June and in July, until there was practically no water in any of the reservoirs. There was no great quantity in the reservoirs when Mr. Wallis came here.

Recross-examination by Mr. RUICK.

I was at the reservoir when the men were cleaning it out. I don't think there was any water there at all. Between spring and that date I was up there from three to five or six times. Nearly every summer I like to see how the water is holding out, just as a citizen living here with some little interest in the town would do, and I would drive up there when I'd be out driving. The water depreciated in quantity from the time I saw it in the spring. I saw it again after the cleansing operations had been suspended; I think every one of the reservoirs had been emptied. The water that had been used in washing the reservoirs had been turned into the river. [141]

**[Testimony of William Ashton, for Complainant
(Recalled).]**

WILLIAM ASHTON, recalled, testified as follows:

Direct Examination by Mr. CLARK.

A smooth, straight, cast-iron pipe of the length of the one leading from Gibson Jack Creek to the upper reservoir, with that head, would deliver three second feet. The pipe that leads from Gibson Jack to the upper reservoir would not carry that much because it is laid with bends and angles. Any diversion from a straight line or direct grade affects the flow; therefore it would deliver less. I could not estimate the amount less than three feet in this particular pipe with any degree of accuracy without examining it and getting the divergencies.

Q. You heard the measurement given by Mr. Moore as to the amount of water delivered. Can you tell whether or not, in your judgment, that measure would be approximately correct?

Mr. HAWLEY.—I object to that unless that amount is stated, because there may be a misunderstanding on the part of the witness as to the amount.

Q. What would be your conclusions as to the amount less than three second-feet that this pipe would carry, if you have any conclusions as to that?

The COURT.—You may answer the question, Mr. Ashton, if you can.

WITNESS.—I doubt if I could give any close estimate as I fail to recall the conditions of that pipe.

(Testimony of William Ashton.)

Cross-examination by Mr. RUICK.

It was a pipe capable of delivering three cubic feet of water per second of time.

Redirect Examination by Mr. CLARK.

That is, it would be capable of delivering three second-feet under favorable conditions as stated.

[142]

[Testimony of W. P. Havenor, for Complainant.]

W. P. HAVENOR, called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at 473 South Fourth Avenue, Pocatello, and am a civil engineer, regularly licensed; have studied and practiced engineering for twelve years,—ten consecutive years in this State. Perhaps a third of my work during this time has been measuring water, surveying ditches, etc. I am familiar with the mains and reservoirs of the Pocatello Water Company.

(Map marked Complainant's Exhibit No. 9.)

I am familiar with the matters shown upon this map, exhibit No. 9. It represents the townsite of Pocatello, and the red lines, water mains, red dots, fire plugs. There are one or two lines not represented upon this plat, showing other water mains of the company. There are private lines in the city connected with the water company's plant, but they could not be called mains as they are intended to supply service to private consumers, not sufficient number or size to entitle them to be considered

(Testimony of W. P. Havenor.)

mains. Some of them may have been constructed by the water company; many have been constructed by private individuals. The water company has three reservoirs on the hill above Pocatello.

(Map offered in evidence and at the request of Mr. Ruick more questions asked to establish its accuracy.)

The map was made in the office of the Bannock Engineering Company. I had supervision of it and know it to be approximately correct.

(Replying to question by Mr. Ruick:) It does not show every line of the water company; it was one of the earlier plats and there have been one or two additions since.

(Mr. Clark states he will have witness mark additional lines and extensions on the map, and with this understanding, [143] it is admitted in evidence.)

(Witness resumes:) On August 21, 1911, I measured the amount of water flowing in Mink Creek, above the intake of the company, and found 3.2 second-feet.

On August 22, 1911, I measured the water being discharged from the Mink Creek pipe-line into the flume above the Gibson Jack intake and found .46 of a second-foot.

This pipe-line is the only means of conveying water into the water system of the company. On August 22, 1911, I measured the water flowing into Gibson Jack Creek and determined the quantity to be 1.63 second-feet. On the 7th of September, 1911, I

(Testimony of W. P. Havenor.)

measured the water flowing in Cusick Creek and found .13 of a second-foot. All these measurements were taken above the intakes of the company's pipe-lines. On Gibson Jack Creek it was taken 183 feet above the intake. There was no water coming into the creek between the point of measurement and the intake in any case.

The water is conveyed from Gibson Jack Creek to the company's water system through one pipe-line. This is the only method for conveying waters from both Gibson Jack and Mink Creek to the reservoirs. There are three reservoirs in connection with the company's system, usually designated the "Upper" "Middle" and "Lower" reservoirs. The upper reservoir is the highest and the company's pipe-line runs through these reservoirs to the city. According to the water company's measurements, the upper reservoir has a capacity of 2,250,000; the middle reservoir has the same and the lower reservoir a capacity of 843,750.

Mr. Alex Murray stated to me, in Mr. Winter's presence, that the number of lots irrigated from the system of the company in April, 1911 was 1699. Mr. Murray is cashier [144] of the Pocatello Water Company. That would be approximately 164 acres. I had a conversation with Mr. Winter in which he stated the necessity for improvement of the company's system and what the expense would be to put it in proper condition. I don't have a record of the date, but it was in the early part of this present month. There have been nothing added to

(Testimony of W. P. Havenor.)

the system since 1911 that I would call betterments; there may have been some repairs, but no additions, I think, Mr. Winter said the needs of the city require an expenditure of approximately \$150,000 for increasing the water supply and the distribution system.

(In reply to a question of the Court, witness said:) These private service lines get their water from the Pocatello Water Company.

[Testimony of Walter M. Cleare, for Complainant.]

WALTER M. CLEARE, duly called and sworn as a witness on behalf of the complainant, testified, as follows:

Direct Examination by Mr. CLARK.

I reside at Pocatello and am a dry-goods merchant. Was city councilman in 1901 and know that the water supply at the time Ordinance No. 86 was passed was unsatisfactory, on account of inadequacy. I have lived in the city at all times since and was mayor in 1905. There was a controversy with the water company during the summer of 1905 as to the adequacy of the water supply. I think almost every home felt a lack of water for its needs, and during the month of July we had to take off the sprinkling wagon for some days because there was no water. The lawns were in poor condition caused by lack of water. At my own home there wasn't enough water, the grass was dry, and, as I recollect, the last of July or first week of August, the trees were bare of leaves, almost. I took the matter up with Mr. Winter and [145] think he said we were getting plenty of water.

(Testimony of Walter M. Cleare.)

After some interviews with Mr. Winter without results, myself and the council met in informal session in Dr. Loux's office, discussed the situation and decided that we had no remedy at hand, but the indignation of the people and their demand for relief was so great that we felt that, having nothing to offer them ourselves, if they could find something we would put them in the way of getting it, and we called a mass meeting, so they could organize a committee and see what could be done.

(Document marked Complainant's Exhibit No. 10, shown to witness.)

That is a letter written to me, as mayor, by Mr. Winter in reply to my request for some information in regard to the hydrants from a fire protection standpoint.

Mr. CLARK.—Will there be any objection on the ground that this is a printed copy?

Mr. RUICK.—There is no objection to this printed document on account of its not being the original but a copy thereof. The only objection we have is the general objection stated on yesterday to all this class of testimony on which your Honor ruled.

The COURT.—It may go in subject to the objection. I don't know just what the purpose is, but we will see when we come to argue the case whether it is material or not.

I do not believe any water from Mink Creek, in addition to what was then being delivered, was brought to the city after that letter was written. Mr. Winter did not give me the reason why the water

(Testimony of Walter M. Cleare.)

was not brought to the city.

I have lived in Pocatello since 1905 and the [146] condition during subsequent years, when the season was dry, has been the same as prevailed in 1905. I think there has been an agitation almost every year over it.

I was succeeded as mayor by Dr. Loux; he was succeeded by D. W. Church and Mr. Church by J. M. Bistline.

I think 1911 was another serious year with the city and things were very dry. I was requested to make a special trip through the city with others to make observations, and I recall that there were only two or three places that didn't show the lack of water upon the lawns and trees. I think this serious condition prevailed for some weeks before the observation was made, which was, as I recall, the last week in August or first week in September.

Cross-examination by Mr. HAWLEY.

I made this examination in 1911 in company with Theodore Turner, Lyman Fargo and Jesse Budge, at the request of the city attorney. We went in an automobile and spent one afternoon. No one else was with us; we went up and down the various streets and into some yards when necessary to make a closer inspection. We have no written record of the inspection and made no formal report. I am giving my recollection of it; that is all the data I have. We discussed it together, which emphasized it to our minds. We talked it over among ourselves, compared notes, and the opinion was all the same. Mr.

(Testimony of Walter M. Cleare.)

W. A. Anthes' place on South Ninth Avenue and Mr. Henry Higson's on South Seventh did not show the effects of lack of water, but we didn't go into the yards to make a critical examination or ascertain the difference in these conditions, simply noted it. While mayor I would be called as a matter of complaint and would go and see whether the complaint was well founded with reference to the [147] scarcity of water, but I made no memoranda.

My only experience in the use of water has been in taking care of my own place. In 1911 the trees were almost stripped of their leaves, and I judged by my own plants that it was occasioned by lack of water. I don't know that any of my trees died that particular year. In all the years I may have lost two, from drought.

Redirect Examination by Mr. CLARK.

(Letter marked Complainant's Exhibit No. 1 introduced; signature of George Winter identified by witness; general objection by Mr. Ruick.)

Mr. CLARK.—I desire at this time to call the Court's attention to a paragraph in this letter. "It will also be remembered that during the months of July, August and September the capacity of our system to furnish water for such secondary purposes is severely taxed."

Mr. RUICK.—What are the secondary purposes, Mr. Clark?

Mr. CLARK.—Irrigation and street sprinkling and gardening purposes. This is dated May 17, 1906.

(Witness replying:) I think in almost half these

(Testimony of Walter M. Cleare.)

years my trees shed their leaves thirty days early and had a poor appearance. I think many times at night the water was shut off entirely, since 1905. My recollection is that in the year 1911 the water was shut off at night for possibly two weeks. I am not clear about its being shut off in the day time.

The COURT.—Well, do you mean at night just temporarily or all night? [148]

WITNESS.—All night,—that is, all the night that I had knowledge of. I don't recollect whether this was true of 1910 or not.

Recross-examination by Mr. HAWLEY.

The water was shut off approximately two weeks in 1911 at night, the domestic supply also. I think there were published rules that the water would be shut off at a certain time every night and we must draw a supply for the night. This notice was given by the water company. I couldn't say what the printed form contained besides the fact that it was to be shut off; it may have had something else on it and it may not; I couldn't say. This occurred in other years also; I couldn't say whether it was about the time the reservoirs were being cleaned up at the instance of the health commissioner of the State or not.

I would say that approximately five seasons since 1901 my trees presented a poor appearance; when the weather was hot and dry and we were looking for shade the leaves were not there to give it to us. It was generally about the middle of August. I have

(Testimony of Walter M. Cleare.)

never had any experience in the cultivation of soil and trees outside of my own home.

[Testimony of Henry K. Higson, for Complainant.]

HENRY K. HIGSON, a witness duly called and sworn on behalf of complainant, testified as follows:

Direct Examination by Mr CLARK.

I reside at 445 North Garfield, Pocatello, Idaho, and was a member of the city council during the term of Mayor Church; took office in April, 1909. During my term there were some differences with the water company over the shortage of water. I think this was the second year, 1910. There was not enough water for sprinkling lawns and trees, [149] that is, we were not allowed enough time to sprinkle. For about two weeks there was no water furnished at all at night. I went at one time to Mink Creek and once to Gibson Jack to find out what was the trouble. I made a report on the Mink Creek trip. At that time they were getting no water at all from Mink Creek. George Green was there with a force of men putting in some new pipe, where the pipe-line runs along Mink Creek before it goes over the hill. The old pipe was rotted out and all the waters of Mink Creek at that time were going down the creek. The shortage continued during the entire season.

I went to Gibson Jack Creek afterwards; don't remember the date. I went up with a member of the board of underwriters who came here to investigate the water proposition in regard to either canceling the insurance or raising the rates and I made the

(Testimony of Henry K. Higson.)

trip at this time to show him what supply of water we had. This was either August or September, 1910. I found plenty of water at Gibson Jack Creek; it was flowing over the dam or gates and running down the creek but part of it was going through to pipe to the reservoir. I came to the conclusion that we were not getting more water because there was no way of getting it from the reservoirs from Gibson Jack Creek; the pipe-line wasn't sufficient to carry it. There was a shortage of water in Pocatello at that time; it was about the time the water was being shut off at night or right before that. It was the cause of the insurance man coming here to investigate the water supply with regard to fire protection. The water was shut off about seven, I believe, and turned on again about six. There were rules at this time about sprinkling hours. [150]

For the past eight or ten years we have been troubled with a shortage of water nearly every year. I think I remember one or two, or possibly three years that we were not bad off. The city and the irrigated section increases every year.

Cross-examination by Mr. HAWLEY.

I have lived here eighteen years. I never held any position under the city except councilman during this time. I am in the mercantile business and never had any experience in irrigation or tree culture outside of my own lawn. I don't think we had any trouble in 1909 but I think we had a good deal of rain then.

My idea of the water being short in 1910 depends

(Testimony of Henry K. Higson.)

to a great extent upon the fact that there was not enough water to sprinkle, at least not enough time to sprinkle. I usually got all I wanted; I got up earlier than my neighbors. I was shut off for disobeying the rules of watering. There were certain regulations about not letting the nozzle be taken from the hose but I don't think that led to the shortage of water; I didn't let the water run that way and don't know if any of the neighbors did.

I was at Mink Creek July 12, 1910. They were repairing the pipes then and no water was coming from Mink Creek into Gibson Jack Creek. I didn't go to the reservoirs.

I went to Gibson Jack Creek with the agent just to see the water supply; I think it was about the first of August. The agent doesn't live here; the driver, William Price, lives here. The water was flowing over the dam there at the time. I didn't get to the reservoirs, but I know there was more water than was being carried to them.

[Testimony of Finn H. Berg, for Complainant.]

FINN H. BERG, a witness duly called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK. [151]

I am city clerk of the City of Pocatello and have possession of the record of the minutes of the city council.

(A book identified as a record of the proceedings of the city council from November 18, 1909, to the present time by the witness is presented.)

Mr. CLARK.—I desire to offer in evidence the

(Testimony of Finn H. Berg.)

resolution found on page 61.

Mr. RUICK.—The printed resolution here?

Mr. CLARK.—Yes.

Mr. HAWLEY.—What is the date of that?

Mr. CLARK.—September 1, 1910.

Mr. RUICK.—We object to this as incompetent, irrelevant and immaterial under the pleadings and issues in this case.

The COURT.—It may go in for future consideration.

(Resolution read into the record.)

September 1, 1910, P. 61, record of council proceedings:

Mr. Church explained the water situation and the councilmen in turn gave their view.

Mr. Bistline presented the council with the following resolution, and upon motion duly made and seconded same was carried and ordered by the council by the following vote:

Yea, Bistline, Williams, Peterson, Garbett, Valentine, and Higson. No, McCarty, Absent, Bohlschied. Carried as follows:

TEXT OF RESOLUTION.

Whereas the City of Pocatello did on the 4th day of June, 1892, grant to the Pocatello Water Company a franchise to construct and operate a complete water system for the purpose of supplying the city of Pocatello with a sufficient supply of pure water and

[152]

Whereas, said ordinance and franchise requires that in case of failure of the Pocatello Water Com-

(Testimony of Harry K. Higson.)

pany to comply with the terms of said franchise, the city of Pocatello should give a due and reasonable notice to said Pocatello Water Company, and in the event of a continual failure to comply with said ordinance, the said city of Pocatello retained the right to declare said franchise null and void.

Now, therefore, be it resolved by the mayor and city council of the city of Pocatello

1. That the Pocatello Water Company has failed to comply with the terms and conditions of said ordinance and franchise.

2. That six months is a reasonable time within which such changes and additions as may be required to the present system in order to comply with said franchise.

3. That the mayor and city council of the City of Pocatello hereby give notice to the Pocatello Water Company to make such needed changes and additions on or before the 1st day of April, 1911, in default of which said franchise shall be declared null and void.

[Testimony of Harry K. Higson, for Complainant (Recalled).]

HARRY K. HIGSON, recalled, testified as follows:

Direct Examination by Mr. CLARK.

I remember the resolution appearing on the minutes of the proceedings of the city council under date of September 1, 1910; I remember Mr. Winter being present and the resolution was read in his hearing.

(Testimony of Harry K. Higson.)

Cross-examination by Mr. HAWLEY.

I am quite positive Mr. Winter was present. I remember an argument between him and councilman Bistline at that time, not over the resolution but over the general water question. I fix the date of the resolution as that was what brought up the argument, I guess. The argument was [153] brought on by the questions Mr. Bistline put to Mr. Winter. I couldn't say positively whether it was before or after the introduction of the resolution. I couldn't say whether the fire insurance men were present and I don't remember that a part of the discussion was with reference to the fire supply. As I remember, it was over whether there would be improvements made and more water brought in. I do not recollect a meeting of the council that year at which Mr. Winter and representatives of the underwriters were present. I remember Mr. Winter being present on two occasions after I became a part of the city administration; once just after we took office in 1909 and this other time.

Redirect Examination by Mr. CLARK.

It is my recollection that this resolution was read in his presence and hearing.

[**Testimony of C. E. M. Loux, for Complainant.**]

C. E. M. LOUX, duly called and sworn as a witness on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at Pocatello and am a coal dealer; I was on the council from 1905 to 1907 and succeeded Mr.

(Testimony of C. E. M. Loux.)

Cleare as mayor. During the entire two years I was on the council there was a great deal of complaint in regard to a shortage of water. The lawns were badly in need of water, so were the trees. A great many trees lost their foliage on this account. Immediately after I took office as mayor the water question came up. The trouble seemed to have been over the sprinkling of the streets. Prior to that time I don't remember hearing of any complaint about a shortage for street sprinkling, but about the time we took office there seems to have been reducers put in all the standpipes, or nearly all, through which the sprinklers got their supply of water. I think we [154] took office the latter part of April and about the middle of May the sprinkling man reported to the council about not being able to fill the barrels with which he was sprinkling the streets. We went with him to the goosenecks and found that the time to fill the sprinkling wagons run from thirty-three to forty-five minutes. I don't know when the reducers were put in; I had no knowledge as mayor that they would be put in. We tried to find out what right the water company had for meddling with those goosenecks, because they belonged to the city, as I understood it; the city put them in at their own expense. My recollection is that the fire and water committee had conferences with Mr. Winter in reference to it.

Conditions were very bad during the entire two years I was mayor. There was a great deal of complaint from various people about not being able to

(Testimony of C. E. M. Loux.)

even take a bath in their second story buildings or to flush their toilets. I was over the town a good deal and found trees and lawns were dying for want of water. I visited the reservoirs on two different occasions and found them full when there was a shortage in the city. I also found water had been running down a ditch from the reservoirs to the river during the night. It was not running when I visited it but had been running within the past twenty-four hours through that ditch. Whether that comes from an overflow of the reservoir or from a pipe at the foot of the hill, I couldn't say as to that. I was satisfied that there was water being wasted when the people of Pocatello were suffering for water.

Mr. HAWLEY.—We ask that that be stricken out.

The COURT.—Yes, the motion is allowed.

This condition existed during the entire two years I was mayor. It was taken up with Mr. Murray and Mr. Winter.

It is my recollection that there has not been a [155] summer since I was mayor, nor for a good many years before, that there wasn't a shortage.

I only know through hearsay of cases where the water company refused to put in mains to supply people with water service. Mr. Bistline, I believe, reported that in the council though. You will perhaps find it in the record, where he was refused connection even after he put in his pipes.

Mr. HAWLEY.—We move to strike that out as hearsay.

The COURT.—The motion is allowed.

(Testimony of C. E. M. Loux.)

Cross-examination by Mr. HAWLEY.

There was a serious water deficiency in 1907 and extended during the entire summer. I went to the reservoirs several times; there was plenty of water there at times and I have been there when the water was low in the reservoirs. I think I know of my own knowledge that the conditions of the trees and lawns was due to scarcity of water. I have two lots and a little tract of land out of town which I have irrigated some. I had no complaint to make with reference to my own personal property; I was pretty close to the main and by getting up early I usually got my sprinkling done before others started. I came to the conclusions in regard to others from the observations I made and the method the water company provided for those parties for irrigating, that was a very short time and very little water. The labors of a great many people were such that they couldn't comply with the rules very well and sprinkle their lawns unless they would hire a man to do it.

I was up to the reservoir a number of times during 1905 and 1906. I have seen the upper reservoir full and very seldom was it very low. The lower reservoir was sometimes low. I was up there very frequently during the months of July and August.
[156]

Redirect Examination by Mr. CLARK.

I have been told that the reservoirs are so arranged that the water can be drawn off from one without interfering with the other.

[Testimony of W. P. Havenor, for Complainant (Recalled).]

W. P. HAVENOR, recalled, testified as follows:

Direct Examination by Mr. CLARK.

(Witness presents a map which is marked Complainant's Exhibit No. 9 and substituted for the other, which is withdrawn.)

I believe this map is complete to the best of my knowledge and belief. On this map the pipe-lines of the various sizes are shown in different colors; the legend explains that fully, and also the fire-plugs.

I made an estimate of the number of people served here by the water company, approximately 7,500. I estimate that with the conditions existing in Pocatello, and the irrigating conditions considered also, about 350 gallons per capita should be served during the dry months of July and August.

Mr. RUICK.—350 gallons per day?

WITNESS.—Yes, sir.

Direct Examination.

(Witness resumes:) That consumption per capita would vary considerably, depending upon the time of year. I believe the calculations which I have checked show theoretically about 2.74 second-feet delivered at the intake of the pipe-line; that isn't delivered at the reservoir. I figure my estimate on the assumption that deducting loss from leakage and evaporation, there would not be delivered for the use of the distributing system more than 2.5 second-feet,

(Testimony of W. P. Havenor.)

which would amount to about 1,620,000 gallons per day. Estimating a population of 7,500 and 350 per day per capita, the water consumption during the months of [157] July and August would, on a basis of 1,620,000 gallons, leave a deficiency of 1,005,000 gallons.

Q. Then for the service of the people of Pocatello, upon that basis, the capacity of this plant should be doubled for the dry months of July and August?

Mr. HAWLEY.—We object.

The COURT.—Well, that would be a conclusion anyhow.

Q. Now, Mr. Havenor, what is the amount of water that is usually considered as sufficient per acre in this country for irrigation purposes?

Mr. RUICK.—We object to this as incompetent, irrelevant and immaterial under the pleadings and issues in this case. We are not in the business of irrigating farm lands, or even gardens, and are under no obligations to do it, never agreed to do it. That is the theory upon which they are proceeding here, that we are irrigating the townsite of Pocatello for gardens and other purposes.

(Question is changed by Mr. Clark.)

(Witness resumes:) I have a comparative opinion, based upon my experience, as to the amount per acre that would be necessary to irrigate lawns, such as exist in the City of Pocatello, taking into consideration the fact that these lawns are separately irrigated and cover from one to two or three lots.

Mr. RUICK.—I desire to interpose an objection

(Testimony of W. P. Havenor.)

here at this time, that this witness hasn't qualified himself to testify with regard to that; he has shown no qualification at all on the subject.

The COURT.—Perhaps that is true.

Mr. RUICK.—Your Honor is aware that a civil engineer [158] is not necessarily an expert on irrigation.

The COURT.—I have sustained you. Go on.

(Witness resumes:) In a general way I think I have become familiar with the duty of water upon lawns and upon irrigated lands and other lands that are required to be irrigated, and think I am qualified to express an opinion as to the duty of water, I have had experience in measuring water in various parts of the state, in having it applied through ditches upon land, in executing orders of decrees and judgments that have been entered with regard to the use of water and in actual use both on farm land and city lots. I mean by a comparative opinion that so far as I can learn through any investigations made by myself or any others, no accurate, reliable data has been made concerning the duty of water for the use of lawns exclusively, therefore any opinion with regard to it could only be based on comparative terms.

Q. I now renew the question and ask the witness what the duty of water is in his opinion upon lawns in the City of Pocatello per acre.

Mr. RUICK.—We object to this. He hasn't qualified.

The COURT.—The objection is overruled.

(Witness resumes:) I should say that the duty of

(Testimony of W. P Havenor.)

water for lawns in the City of Pocatello is less per acre than the duty for ordinary agricultural purposes would be.

Q. How much less?

Mr. RUICK.—The same objection.

The COURT.—Overruled.

(Witness resumes:) I think sufficiently so that the legal amount of water allowed in the State of Idaho would not be more than [159] sufficient, for—an inch per acre, or fifty acres per second-feet.

Cross-examination by Mr. RUICK.

In making the estimate of the people served by the water company, I used as a basis the returns that were made by the survey which was made by Mr. Reynolds and his party under my direction in 1912, and based upon the number of dwellings which were being served, and using the multiplier of five, the average number used for the members of an ordinary family; I added an estimated number who were dwelling in rooming-houses, hotels and other places which would not be so included. I also checked that estimate by other means, such as the population of the town, the annual increase of the town, and the returns made by Mr. Murray in an actual survey, in which he states that he made note of every person. I got this information from Mr. Murray from the office of the water company during the first of this month. It was in connection with the proceedings before the commission to fix rates. Mr. Murray's estimate included the number of patrons of the water company, the number of taps and other matters also.

(Testimony of W. P. Havenor.)

This was in a conversation with Mr. Murray. He offered a recapitulation of a report which he had made and from which I made notes. I have memoranda here but not a copy of the entire data Mr. Murray gave me.

We estimated there were 1276 families of five using water here, making a population of about 6,380. I went over the rooming-houses and boarding-houses individually all from my general knowledge of the size of each, and allowed for them as I thought the inhabitants were, finding about 1120, making a total of 7,600. I included the service to those buildings in my estimate of the amount of water required. I did not state that each individual in these 1276 families of five required 350 gallons of water per day for his necessary use in [160] July and August. My estimate was that 350 per day per capita was required in the city for all uses of water, including gardens, domestic use, business purposes, city and public purposes, all commercial purposes; the total amount divided by the population gives the amount per capita that should be furnished. I didn't make an estimate for the individual, I can do so but it will take little time.

You may start in with 214.5 gallons per day per capita, which Mr. Winter stated was used on his premises during the months of July and August. You can add to that—on the assumption that—seeing this water was metered by Mr. Winter for his own purposes, that the ordinary individual would not have been as careful of it as he was, and that he

(Testimony of W. P Havenor.)

would in all probability have used for himself approximately 300 gallons per capita. However, before I proceed, let me say this, that in making this large increase from 214 to 300, do not overlook the fact that Mr. Winter's premises are situated in a portion of the city where the moisture is much more easily retained than it is on the western side, where the greater portion of the water is used for sprinkling lawns; also the fact that the application of water in small amounts during sprinkling hours in the time specified is not subversive of the best use, and then add to those figures of 300 an estimate of 25 gallons per capita for commercial purposes and used in business houses, and 25 gallons per capita used for public purposes, and you will have approximately 350 gallons per capita.

I have written to different cities in the arid regions while investigating this subject and find that Reno, Nevada, Salt Lake City and Spokane use about the amount per capita I have estimated. I wrote to every city of over 5000 population included in a belt having approximately the same [161] rainfall conditions in the months of July and August as Pocatello enjoys. My estimate is controlled to some extent by the experience of other cities in the arid regions. I did not get replies from all and some replies were very indefinite. I did not make inquiry specifically as to the amount used per capita. You asked me to state some cities that used that amount of water and I named Salt Lake and Reno. I do not remember that Butte or Boise replied, if they did

(Testimony of W. P. Havenor.)

reply they did not state the amount of water needed per capita. I would not state whether there were or were not. I didn't tabulate those figures, other places using 350 gallons per capita. I have given you the information completely on which I based this standard of 350 gallons per capita. I didn't base it on the report from any place, or partially base it on the report from any place. I can't state what the average standard requirement is of places of over 5,000 population in the Rocky Mountain region; I don't believe there is any standard. I think I stated that the reason I noted the requirement per capita in Reno was because it was so excessive. I noted it in Salt Lake because it was rather closely located to Pocatello, and its weather conditions were somewhat similar. Salt Lake might or might not be excessive. The per capita in Reno was 650 gallons. Reno is possibly a little larger than Pocatello. Salt Lake used 350 gallons per capita on a yearly average. I didn't get the summer average. Reno was both summer and winter average. The figures were explained on the basis of the need and dryness in the summer and the excessive cold in the winter, requiring taps to be let run. Probably Butte has quite a small report; there is not very much to irrigate, and not very many trees known to grow around Butte. I haven't been there for several years, I have heard that they [162] are cultivating lawns and trees but it will take a few years to acquire a large area. I wouldn't want to make the statement that young

(Testimony of W. P Havenor.)

trees and lawns require as much or more water than old ones.

Redirect Examination by Mr. CLARK.

Sometimes these estimates included the entire yearly period and sometimes they do not. I recall one reply that was very distinct; it was from the City of San Diego and said that the requirements there on the average for the entire year were 102 gallons per capita of population, but most of them were not quite as distinct as that and some of them were giving the consumption for the months I had inquired particularly about, July and August. I believe these replies were given as to the entire population of the city. I would say that my estimate was conservative. The statement of the water company themselves shows 400 gallons per capita being furnished to the City of Pocatello. That was their statement. I don't believe it. Mr. Winter was using 215.4 gallons per capita for three persons on his premises during July and August. This was metered and he said he thought he was using the amount required for proper growth but not in any excess and not wasting any.

Recross-examination by Mr. RUICK.

If there had been five persons in Mr. Winter's home, I do not think the quantity of water used would have been materially increased. A person living transiently in a hotel will use more water than one who is living in town I have no doubt. Of course the water for sprinkling purposes does not apply to them, but averaging them in with the others I think

(Testimony of W. P. Havenor.)

that is a fair average. I think the average transient in Pocatello on a day like this would use as high as 100 gallons. The supreme test of a water plant comes in the [163] summer time. It is then there is the greatest demand and likely to be the greatest scarcity.

I don't want you to misunderstand that statement, 350 gallons. I don't mean that any individual you might pick out would use that amount necessarily, but it isn't safe to have less than that amount, in my opinion, considering the danger of fire and all those things being largely increased at that period of the year. I think that amount should be supplied.

(Witness replies to question of the Court:) I made no estimate of what would be required per capita, cutting out the sprinkling or irrigation service. It is usually estimated that 100 gallons per capita should be supplied for domestic purposes.

(Mr. RUICK continues recross-examination:) Spokane sent me its water code, I think that was their reply. I understand it has a municipal water plant and that conditions are very much like conditions around Pocatello.

(Statement from the water code of Spokane read and witness' opinion as an expert asked, regarding the following:)

Mr. CLARK.—“The evils due to waste of water, and the proper remedies therefor, constitute the hardest problems which water-works managers have to solve. Unless consumers will co-operate in stopping undue waste the problem is hopeless. The

(Testimony of W. P. Havenor.)

average normal consumption of water in American cities for all purposes is fifty to seventy-five gallons per capita per day. Spokane furnished to her citizens in 1910, 269 gallons per capita per day. Every citizen who allows water to be wasted places an unnecessary burden upon every other consumer of water in the [164] city and delays the day when the price of water may be reduced."

Mr. CLARK.—I object to that going into the record, as incompetent and immaterial and not proper cross-examination.

Mr. RUICK.—The examination has taken a very broad scope, and I want to ask this witness if he deems that a fair statement of the conditions in this western country, a fair statement to be made.

The COURT.—The objection is sustained. It isn't cross-examination, that is, other than the statement as to the amount of water consumed, which would come within the scope of the cross-examination, but the other matters will not be cross-examination.

(Witness replies to changed question:) The statement here relative to the average consumption of water in American cities for all purposes may be correct. I do not know the sources of the information but I rather doubt it. All the information I have is to the effect that those figures are generally exceeded, most of the information, not all of it. And it is particularly true of cities in the western portion of the country.

The only investigation I have made in other cities

(Testimony of W. P. Havenor.)

was that by correspondence with reference to ascertaining the amount of water necessary per capita and that wasn't particularly for that purpose but only incidentally. The figures that I received weren't made a portion of the basis of my estimate at all; they were only for comparative purposes.

[Testimony of F. W. Dice, for Complainant.]

F. W. DICE, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination.

I live at 714 East Center Street, Pocatello; am a railroad conductor. In 1910 I made an application to Mr. [165] Winter to extend the Pocatello Water Company's mains along the streets so as to furnish me with water. It was necessary to build a pipe-line in the street for one block to connect my place. Mr. Winter told me he would not lay the pipe-line. I had it laid myself and paid for it in part. It was in company with others who wanted water on the same street. I could not say positively how many, excepting one, there may have been two. I am in a settled portion of the city. It is three blocks from the courthouse. There is no main on Sixth Street at all, except my private main.

Cross-examination by Mr. RUICK.

I connected with the company's main on the corner of Seventh and Whitman, I believe. We had to run a block. I believe there were only two living on that block at the time I made application. One joined with us in laying the pipe; the other party

(Testimony of F. W. Dice.)

didn't build. I lived across the street. There was one house below me in the same block but they had water. I don't know where they got it. I was the only one on my side of the street and there was one across the street who joined with me; that is the only one I know of positively; there may have been another one. There was another man who wanted water but he backed out, when he had to lay his own main. He told me to make application to the water company.

[Testimony of J. H. Townsend, for Complainant.]

J. H. TOWNSEND, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at Pocatello; am a second-hand dealer; I own some residences in Pocatello that are supplied with water from the Pocatello Water Company's system. Five years ago I made application with two other parties to the water company to build mains in the street so I could connect with their system. There were three houses close together on North Harrison and we wanted the water company to extend the main down about a [166] block so we could tap it. The water company didn't pay any attention to the application. I didn't take any water for that place, Spillman and Henderson, the other two parties, put in their own pipe. Since that time I made application over on Sixth avenue, for blocks 267 and 266. The company didn't pay any attention to this application and I put in the pipe-line myself for a block and a half. It was three-quarter inch

(Testimony of J. H. Townsend.)

pipe and cost me about \$90.00. There are four families on my pipe-line. That was four or five years ago. About three years ago I brought water from Seventh avenue to a place on Sixth; put it in the same trench where a Mrs. Mickle, I think, had already put in a pipe-line. I didn't make any application this time, I knew it was no use. All the parties who live on Sixth avenue get their water from Seventh avenue, private lines. There must be ten or fifteen families on Sixth now. There is no main on Fifth avenue, the water comes from Seventh, I think. I think the people on Fourth are supplied fairly well.

I believe Mr. Winter stated in our meeting to Mr. Havenor that it would require \$150,000 to make the improvements and extensions; that the plant required that much expenditure for improvements.

Cross-examination by Mr. RUICK.

I don't think Mr. Winter mentioned anything about rates just then, but I believe he said that the needed improvements that he would like to see made would require that expenditure. I laid the pipe on Sixth street in both places. I didn't join with the others on North Harrison. I applied alone on Sixth street; I went to the office and asked if they intended to put in a main either on Fifth or Sixth that year. They have a main on Seventh a block further out. The parties on Sixth street have all been served through private pipes from Seventh.

[Testimony of T. C. Martin, for Complainant.]

T. C. MARTIN, a witness called and sworn on behalf [167] of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at 352 North Main Street and am a furniture dealer. I am at present a member of the city council; took office about May 1st, 1911. Shortly after going into office the city had some controversy with the Pocatello Water Company owned by Mr. Murray. During the months of July and August, 1911, the supply was very limited. At one time the water was shut off for quite a long period and the city was without water for domestic use or fire protection. We called on Mr. Winter at his home on Third avenue to determine if some settlement could not be made of the water situation. I don't remember the entire conversation, but I do remember that Mr. Winter gave us absolutely no reason to think that we would have better conditions. I believe he said they would be much worse before they were improved. I do not recollect anything further that was said by Mr. Winter at that time.

I remember when Mr. Wallis, the pure food inspector was here. I had been up to the company's reservoirs prior to that time and found them empty. The upper reservoir had probably a foot of mud in the bottom and the entire supply was running down in the shape of a little creek through this mud. All three of the reservoirs were empty. I should think this was five or six days prior to Mr. Wallis' visit. The reservoirs being in that condition left the city

(Testimony of T. C. Martin.)

without fire protection. My recollection is that that condition was during the period of about three weeks. I believe the District Judge appointed two men to handle the water supply and it was handled in such a way that there was a surplus accumulated in the reservoirs which provided for fire protection. It was taken out of Mr. Winter's hands for the time being. I was one of the men into whose hands the plant was put. We made very stringent rules here in the city concerning the use of water and [168] finally accumulated some in the reservoir.

I served on the council from 1907 to 1909 and during that time we had trouble with the water company on account of the shortage of supply and the refusal of the company to allow the city to use fire hydrants for filling sprinkling wagons. It is a matter of common knowledge that, with the exception of one summer, for the last eight years there has been a shortage and a great many houses have been unable to get any water during the day time. During those times I believe it was the practice for some years for the company to shut the water off during the night and turn it on in case there was a fire alarm blown, and that was the only water that could be had during the night; when the fire-alarm was blown it was turned on for fire protection. I remember the time in 1911 when Mr. Winter was arrested.

Q. What was it lead up to that crisis?

Mr. RUICK.—We object to that. We are not trying a criminal case here. * * * I object to it as incompetent, irrelevant and immaterial.

(Testimony of T. C. Martin.)

The COURT.—Sustained.

(Witness resumes:) More than once the water was shut off without warning to the city. The last time before the citizens took charge was on Monday morning between seven and eight o'clock and was shut off all day.

Cross-examination by Mr. HAWLEY.

This shutting off of the water occurred right after Wallis' visit. My recollection is there was no notice given. I was a member of the council and the fire and water committee at the time. We investigated and the reason the company gave was that they could clean the reservoir better by shutting the water off. The reservoirs had been ordered to be cleaned by [169] the pure food inspector. I don't know that the company ever gave any reasons that it was necessary to shut this water off, they never came to my knowledge if they did. I didn't go to the company as a member of the committee but made an investigation personally with them; I went to the reservoir. I found them cleaning the reservoir. I didn't see Mr. Winter; Mr. Wallis wasn't there. I think George Green, a plumber, had the work in charge. We thought it was unnecessary to shut the water off at that time for that purpose as water could have been accumulated in the lower reservoir while the upper reservoir was being cleaned. I examined the upper reservoir and found about a foot of sediment that collects from the mountain streams. I think the upper reservoir is used as a means of collecting it. The other reservoirs were not in that

(Testimony of T. C. Martin.)

condition; it is just the upper reservoir that is used for settling purposes. I did not make any complaint or call the attention of the pure food inspector to it; I don't think that was done by the committee or the council. Frogs and snakes had been found in the water mains, which I think led to the agitation in the first place, but it may have been indirectly our finding conditions in the upper reservoir that finally led to the pure food inspector coming. All I know of the finding of frogs and snakes is from report.

Shortly after the reservoir was cleaned that same year the water was put into the hands of Mr. Green, to represent the water company, and myself, to represent the city. We were to superintend the distribution of water and remedy conditions if possible. I don't know that there were any proceedings in court; I think the judge authorized it. I think it was mutual understanding with the consent of the judge. [170]

Redirect Examination by Mr. CLARK.

There was talk of asking for a receiver to take the plant out of the company's hands, but what the proceedings were I don't know. When I went up to see the reservoirs five or six days before the state inspector came, they were dry. They were not clean but they didn't have the accumulation of mud there was in the upper reservoir.

Recross-examination by Mr. HAWLEY.

There was some accumulation on the bottom of the reservoirs and the sides too. During the cleaning

(Testimony of T. C. Martin.)

process I think they were washed out, about the same time as the other.

[Testimony of H. A. Collins, for Complainant.]

H. A. COLLINS, a witness called and sworn on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I live at 757 North Garfield and run a variety store. In the middle of September, 1910, I was at the upper reservoir of the Pocatello Water Company and found that in the upper end where the intake pipe comes in there was no water at all except as it flowed in; about three-quarters of the bottom of the reservoir was covered with about a foot of water. In the upper part where the water came in there was an accumulation of sediment, I should say two or three foot high, where the water came in and the water had washed a channel through this and trickled through. I took a picture of the upper reservoir at that time.

(Photograph, marked Complainant's Exhibit No. 12, identified and explained by witness, offered in evidence, subject to general objection to all of the evidence.)

Cross-examination by Mr. HAWLEY.

That is the only time I was inside the inclosure at the reservoir. I was just out for a walk accompanied by my sister and happened to have a camera with me. We went [171] into the reservoir and walked around it. Also went to the other two. I think the center reservoir was full at the time. I don't think the lower reservoir was completely filled.

[Testimony of O. J. Bell, for Complainant.]

O. J. BELL, a witness called and sworn on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at 206 South Garfield, and am probate Judge at present. I have been on Mink Creek several times each summer for the last ten years. Last summer I was there twice; the summer before probably a dozen times and in 1909 I camped just above Mink Creek for three or four weeks, prospecting. I know where the intake of the Pocatello Water Company is. Every time I have seen Mink Creek for the past ten years there has been water running past it. I couldn't say what proportion. It is quite a good-sized stream. The water company's pipe line diverts a small portion of the waters; I don't know how it is the last few months. There has never been a time, to my knowledge, when the pipe-line has diverted all or approximately all the waters; it is not large enough.

(No cross-examination.)

[Testimony of W. E. Trapp, for Complainant.]

W. E. TRAPP, a witness called and sworn on behalf of complainant, testified as follows:

I reside in Pocatello and am a retail cigar and tobacco dealer. I am city councilman; took office about May 1, 1911. During that summer the city had some difficulty on account of the water situation. I was not in town when Mr. Wallis was here and don't think I had been to the reservoirs that year

(Testimony of W. E. Trapp.)

prior to that time. With other citizens I called on Mr. Winter prior to the bringing of the suit that was commenced by the council. The council was urged by citizens to take some action to relieve the situation as to [172] water at that time. I think a committee of the council joined by citizens called at Mr. Winter's residence to see what was doing and what could be done. I think myself or someone else suggested that the situation was bad. Mr. Winter said, "Yes, and it would be a damned sight worse before it is better." He stated to me personally that as Billy Trapp I was all right, but as a councilman, "to hell with me." I wouldn't attempt to relate other conversations. There was general complaint among the citizens. I suffered no inconvenience except that the pressure was very low at certain times and on one or two occasions the water was shut off.

Cross-examination by Mr. HAWLEY.

I was not a member of the Fire and Water Committee, and it was not a part of my official duty to make any investigation. I suffered no inconvenience except that occasionally the pressure was low. I made no investigation of complaints further than to go up to the reservoir.

[Testimony of E. C. White, for Complainant.]

E. C. WHITE, a witness called and sworn on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at Pocatello and am a real estate agent. Have lived there twenty-two years. On quite a number of occasions I have had cause to request of the Pocatello Water Company the extension of mains for the purpose of supplying water. In 1912 and the fall of 1911, particularly for some houses I was building on South Fifth avenue and some others I was interested in. I think there were eight on South Fifth. There are a number of private mains run from Seventh to Sixth avenue and some from Fourth to Fifth. I think it was about eight years since the water company built any mains on the east side of town. I think the population on the east side has more than doubled in that time. In our cases we ran [173] private line from the nearest main. Before running the private line I went to see Mr. Winter regarding it. I showed him the condition and he said Mr. Murray would not make any extensions here until matters were adjusted between him and the city. The matter has been in that condition for the last seven or eight years; if people were off the streets the mains were on they have had to build their own mains. There are residences out to block 52 on Fourteenth. Some residences here on Fifteenth, two or three. The sidewalk district runs out to Fourteenth and there are scattered residences all the way to the cemetery. There is considerable

(Testimony of E. C. White.)

building out as far as Tenth. I should say twenty houses had been built in the past two years on South Sixth, and a good many on South Fifth.

Q. What expense did you go to in the instances where you had to build these lines in order to lay mains in the streets?

Mr. HAWLEY.—We object to that as incompetent, irrelevant and immaterial, and not pertinent to the issues.

The COURT.—The only pertinency that it appears that the evidence may possibly have is that it bears on the question of whether or not it would be reasonable to expect the water company to extend its mains. If the expense is very large it might be unreasonable to expect an extension; if the expense was comparatively light a different view might be taken.

Mr. HAWLEY.—Well, I will withdraw the objection.

(Witness replies:) The lines cost 14¢, 16 and 18¢, depending on whether we put in half inch, five-eighth or three-quarter inch pipe. We put in in some places half inch, some three-quarter and [174] some five-eighth. The six houses, if I remember right, those South Fifth avenue houses, it was about \$300.00. The Pocatello Water Company did not require us to deed these lines in the street to it before it would connect.

Cross-examination by Mr. HAWLEY.

It costs altogether about \$300 for those houses. At the time I was starting the houses I went to see Mr. Winter and we looked the proposition over. I

(Testimony of E. C. White.)

told him there were a great many houses being built and going to be built there on Fifth and Sixth, and I thought there ought to be a water main, but after we went out he said he couldn't do anything until matters were settled with the city. I didn't go to the council or the Court; I went ahead and put them in. The water company didn't object to our making connections; I think it was made under their direction.

[Testimony of Fletcher R. Burrus, for Complainant.]

FLETCHER R. BURRUS, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I live in Pocatello and have for ten years; am in the real estate, insurance and abstract business. On a number of occasions in connection with my business I have had occasion to investigate the water supply of the city. I have been to the intake of the Pocatello Water Company's pipe-line on Mink Creek. I couldn't see any diminishing of the stream after it passed the intake; most of it was going to waste or going down the stream so far as I was able to tell. This was along the latter part of July or first of August, 1910, during the time the water was being shut off at night. The water was shut off from sometime in the evening until early in the morning; this condition existed, as near as I can recollect, possibly six or seven weeks, with an intermission of about ten days. Two or three of the fire insur-

(Testimony of Fletcher R. Burrus.)

ance companies [175] I represented sent men here to investigate and asked for a special report. One of the fire insurance companies that had a possible liability of about \$360,000 in the town, told me—

Mr. HAWLEY.—We object to what they told you.

Q. Did they take any action?

Mr. HAWLEY.—We object to it.

Mr. RUICK.—That is hearsay too.

Q. As to fire insurance rates or otherwise?

Mr. RUICK.—We may not know what the motive of the insurance company was. That is hearsay. We object to it. We will have no opportunity to cross-examine the insurance company or to know what their purpose was.

The COURT.—Sustained.

(Witness resumes:) As soon as the reservoirs were full and the water turned on at night I reported the fact. This was, I think, between about the 25th of August and the 10th of September.

About the latter week of July, 1911, the water situation became acute. I went to the reservoir about that time, found the lower reservoir dry, the upper reservoir practically dry, with mud in the bottom and a stream running through it, the middle reservoir about half full. On the second visit, very close to the 1st of August, the middle reservoir I should judge had a few feet of water. I took this matter up with the council a few days after on account of fire protection. We had to have some action or our business would be destroyed.

(Testimony of Fletcher R. Burrus.)

Q. At the time you visited those reservoirs, what can you say as to whether the City of Pocatello had any fire protection or not from the Pocatello Water Company's plant? [176]

Mr. RUICK.—Is he any more competent to decide that than the Court? This is a question, if the Court please, of the adequacy or inadequacy of the supply of water. I presume the Court can judge from the facts as well as this gentleman, an insurance agent and not an expert.

Mr. CLARK.—Perhaps Mr. Burrus might explain to the Court why the city had no fire protection, if such is the fact.

Mr. RUICK.—If the Court requires an explanation.

Mr. HAWLEY.—It would be a matter of opinion, anyway.

Mr. RUICK.—And by a man that has not qualified as an expert.

The COURT.—I think I will let him answer and state the reasons for it.

WITNESS.—In case of a conflagration the city was without any protection whatever, because after a very small amount of water would be used the water would give out. There was practically no protection in the down town district or a big building. This condition existed as near as I can recollect, from five to seven weeks.

Cross-examination by Mr. HAWLEY.

They were not renewing the pipes the day I was at Mink Creek; I didn't follow the line any further

(Testimony of Fletcher R. Burrus.)

than I could see from the road. It was Sunday. I don't think they were working on the line because there was some water going into the intake. I was there three or four hours; went up partly to look into the situation and partly to get out into the country for a day. Apparently a very small amount of water was going into the intake because there was very little current going into it. There is a runway possibly sixty feet long built up on each side with rocks, and a spillway located [177] on one side of that, and a few feet above the spillway is the intake, in a little stone house, valve-house. I was in the valve-house. There was not very much current where the water was being sucked down. I couldn't tell anything about the amount except by guessing.

The water was shut off, I think, the latter part of July or the first of August. I don't know that the reservoirs were being filled up at night on account of the water being shut off from the users. I don't know what they were doing with the water then. The value of fire protection is in the start of a fire. A fire department and water system is inadequate after it gets started. I understand by hearsay, by talking to the mayor and chief of police and fire chief there was an arrangement made to give the alarm in case of fire.

Q. Do you know that that water was shut off at nights for the purpose of accumulating that water in the reservoir so there would be greater fire protection? A. After a fire gets started—

Q. I am asking you to answer my question.

(Testimony of Fletcher R. Burrus.)

Mr. CLARK.—I object to it as having been answered once before.

The COURT.—Read the question, Mr. Reporter, and answer the question directly, Mr. Witness.

(Question read.)

WITNESS.—No.

[Testimony of Horace W. Doty, for Complainant.]

HORACE W. DOTY, called and sworn as a witness on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I am a railroad conductor; live in Pocatello and have for seventeen years. I am at present member of the city [178] council.

(Witness asked to identify exhibit.)

That was taken out of the standpipe erected on the corner of Clark and First avenue a year ago last summer, 1911. The reason we discovered it the water men went there to fill their tanks and no water; just a little would come from this pipe. The mayor sent a plumber; he disconnected the pipe; I was there at the time, and there was a frog or a toad, had one of his legs stuck in this pipe and had shut the water off, so we took that pipe out. The water coming from the standpipe had to pass through this smaller pipe. That is all the force, or all the water the men could get to fill their sprinklers with. This is the contrivance known as a reducer.

(Exhibit marked Complainant's Exhibit No. 13 and offered in evidence.)

Mr. HAWLEY.—I have no objection to your offer-

(Testimony of Horace W. Doty.)

ing it for what it is worth, under the general objection. We don't admit that it is a contrivance of ours at all.

Cross-examination by Mr. HAWLEY.

A plumber and his helper were with me and took this out at that time.

[Testimony of John McMahon, for Complainant.]

JOHN McMAHON, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I live in Pocatello and am chief of the fire department; have been for a little over three years. We get water for fire protection from the reservoirs of the Pocatello Water Company's system. During the time I have been fire chief we have had a shortage of water during the summer months July and August was the worst. The pressure was very low. Joe Reuss' packing-house down across the river, burnt to the ground,—I think it was the 29th of July, 1910. I had no water at all, to speak of, to fight the fire with. I had one bad fire [179] in August; don't remember the day. That building was almost totally destroyed; I had to get water from the Oregon Short Line Company on that job. There was no water in the reservoir I know because we went up there the next day and the reservoirs was very near empty. This was August, 1911. I made tests during those months in both years, every day I would watch that close. There were times when there was no pressure at all; it was shut off altogether; there

(Testimony of John McMahon.)

was no water in the hydrants of an evening; there wouldn't be any in there until the whistle blew for a fire-alarm and then they would open the valve up there and give us water. At times when there was water on the pressure was a great deal lower than it usually is, that is, 75 or 80 pounds pressure; we usually have 125. As near as I can remember, we was there a month that we had no water to speak of at all for fire protection; this was right along in the month of July. It was shut off sometimes in August too. I don't know exactly how long.

Cross-examination by Mr. HAWLEY.

I can't recall the time of day of this fire in 1910 but I have got the report on my books. I brought the book along. The packing-house fire was July 29, 1911, at two P. M. The August fire was at 1:30 P. M. The water was turned off at night but was turned on again if there was a whistle.

Redirect Examination by Mr. CLARK.

The water was turned off for a while in the daytime but I can't recollect whether it was 1910 or 1911. We used to have to take our horses to the river to water them at noon, there was no water in the fire department at all. We made a trip up to the reservoirs a day or two after the Reuss fire, and the water was low; there was no water in one of the reservoirs at all; I believe it was the lower reservoir that was empty. [180]

Recross-examination by Mr. HAWLEY.

The middle reservoir had water in and there was a little running straight through the upper reservoir.

(Testimony of John McMahon.)

I am positive they were not cleaning the reservoir at that time and had not been shortly before that. They were not cleaning them during the time those fires broke out.

[Testimony of Fred Weideman, for Complainant.]

FRED WEIDEMAN, a witness called and sworn on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at Pocatello; am a merchant, member of the city council and have been for nearly two years. I saw the plumbers taking a reducer out of a stand-pipe on Center and Arthur streets, on the west side of town. This was during the summer of 1911. It was one of the standpipes from which the city secured water for sprinkling purposes.

I think the water situation became acute in July, 1911. I was at the reservoirs a week or ten days before Mr. Wallis came down here. The upper reservoir was full of mud, alive with bugs, and a stream of water running through that mud from the pipe where it came in to where it left for either the city or the lower reservoir. There was a little water in the middle reservoir; the bottom was covered—probably a foot or two. The lower reservoir was dry. This condition prevailed for a month or six weeks.

Prior to the commencement of this suit, I went as a representative of the council in connection with other citizens to interview Mr. Winter. Right after we had been up and seen the condition of the reservoirs we concluded to see Mr. Winter in a friendly

(Testimony of Fred Weideman.)

way and see if the water condition couldn't be improved, and among other things we asked him if he couldn't shut off the water at night, or some hours during the day, so as to get an accumulation of water in the reservoir. [181] He said it was none of his business; he said it was the people's business to shut it off at this end; he said it was his business to get the water into the reservoir and it wasn't his business to take it out or see what became of it. I made one remark there about the doings of the company were not in compliance with the terms of the franchise, and he said, "Damn the franchise." Mr. Trapp made a suggestion in regard to how the service might be improved and Mr. Winter said, "You go to the devil." I couldn't say that we made any headway with Mr. Winter.

Cross-examination by Mr. HAWLEY.

Myself, Mr. Martin, Mr. Turner, Mr. Trapp and I don't know whether there were any more or not who went to see Mr. Winter at that time. I don't know whether he said there was a waste of water by citizens; he said it was the people's business to shut it off down here and cause the accumulation. We were trying to have him accumulate water in the reservoir and we wanted it shut off for that purpose, wanted Mr. Winter to do it, and his answer practically was that it was the business of the people that were using it to shut it off. The water wasn't being shut off at nights by the water company. I don't know whether it was done in 1910; I wasn't there. I don't know

(Testimony of Fred Weideman.)

what became of the reducer the plumber found when I was with him.

Redirect Examination by Mr. CLARK.

Our object in asking Mr. Winter to shut the water off at night was there was fear that fire might destroy the town and we wanted an accumulation of water in the reservoirs so as to have fire protection.

Recross-examination by Mr. HAWLEY.

I think the mayor and council put a notice in the paper advising the people to observe certain sprinkling rules [182] so as to have an accumulation of water. We had rules and they sometimes have been enforced and other times they haven't.

Q. Did you make any effort to see that the citizens complied with this suggestion?

Mr. CLARK.—That is objected to as not proper cross-examination, and incompetent and immaterial.

Mr. HAWLEY.—I think it is, if your Honor please, because it is right on the subject.

Mr. RUICK.—The proposition is this: Here is the official body of the city going to the water company and asking the water company to shut off the water from the city. We want to know why it is that they had to appeal, or thought it was necessary to appeal, to the water company to do that, what were the conditions which impelled them to appeal to the water company to do it. It goes to the very gist of the matter, and we want to know from this witness—we have our theory why it was, and we want to know why it was necessary.

Mr. CLARK.—Do you assume that it is the duty of

(Testimony of Fred Weideman.)

the council to preserve the water supply?

Mr. RUICK.—We assume that, as in this instance, an extraordinary condition prevailed, and water was being flagrantly wasted in Pocatello, to the knowledge of the city council, and it was their duty to prevail upon the citizens to shut off and stop this waste of water, and not lay the *onus* on the water company to do it.

Mr. CLARK.—Well, whenever you prove that—

Mr. RUICK.—That is why we want to ask this question of the witness.

The COURT.—Well, I will let him answer.

(Witness resumes:) [183] I don't know that any further effort was made except the notice given, and asking the people to observe sprinkling hours.

**[Testimony of Finn H. Berg, for Complainant
(Recalled).]**

FINN H. BERG, a witness heretofore duly sworn, upon being recalled, testified as follows:

Direct Examination by Mr. CLARK.

(Witness identifies a book as the record of council proceedings of the City of Pocatello, containing a record of the minutes of the council from January 21, 1904, to November 4, 1909.)

Mr. Clark then offered in evidence certain portions of the minutes of the council proceedings of the City of Pocatello, all of which were admitted without objection except the general objection of the defendant. Said minutes, together with the date and number of the page of the council proceedings being as follows:

———, p. 294:

“Reading of communication from George Winter, superintendent of the Pocatello Water Company, in regard to city water supply. Moved by Chilson, second Smith, that the communication be referred to the Fire and Water Committee and they prepare a written answer to this communication. Also take the matter up with Mr. Winter and see if they cannot come to some satisfactory agreement. Vote Yeas all. Nays none. So ordered.”

Mr. RUICK.—At this point, your Honor, we request the city to produce the communication referred to in the minutes just read.

Mr. CLARK.—I don't know that I can produce it, your Honor. I have gotten together all the letters that I could find on this question from Mr. Winter, and I don't think that I have that particular letter. I think it [184] must have been lost. I will look again carefully and if I have it I will present it to counsel.

August 1, 1907, p. 299:

“Acting Chairman Bistline of the Fire and Water Committee, presented, in the form of a report from the Fire and Water Committee, a communication addressed to the Pocatello Water Company, expressing the views and demands of the city council. The communication was read to the council and ordered filed by the mayor.”

August 22, 1907, p. 310:

“Reading of a communication from George Winter, superintendent of the water works. Moved by

Terrell, second Smith, that communication be referred to Fire and Water Committee, and they submit the questions to the water company as stated by Mr. Bistline. Vote Yeas all. Nays none. Carried."

September 5, 1907, p. 320:

"Reading of communication from George Winter, superintendent of the Pocatello Water Works. Moved by Martin, second Smith, that communication be referred to Fire and Water Committee, and they take this water question up with Mr. Winter and see if they cannot come to some amicable agreement and report back to the city council. Vote Yeas all. Nays none. So ordered."

October 7, 1907, p. 351:

"Reading of communication from George Winter, superintendent of the Pocatello Water Works, in regard to a settlement of the difficulties now existing between the city council and the water company. The communication was referred by the mayor to the Fire and Water Committee."

May 27, 1908, p. 433:

"The special committee appointed to confer with the Pocatello Water Company in regard to proposed Ordinance No. [185] 180 reported, through City Attorney Witty, in the form of a letter to the superintendent of the waterworks, as follows:"

(Reading of this communication was waived by counsel, as it is identical with Complainant's Exhibit No. 7, heretofore admitted.)

June 4, 1908, p. 437:

“Reading of the following communication from James A. Murray of the Pocatello Water Company:

“Hunters Hot Springs, Mont., May 31, 1908.

To the Mayor and City Council of Pocatello, Idaho.

Gentlemen: A communication dated the 25th instant from the Special Committee appointed to confer with Mr. Jas. A. Murray about water supply, containing some objections to a proposal submitted to the council by myself during my recent visit to your city has been received and noted.

As your committee disclaims the power to act with authority, I have concluded to address the council, but in deference to your committee and after a careful consideration of the objections raised by it, I have decided to amend said proposal in favor of the city and the water company's patrons as follows:—

1. The water company will install meters at its own expense.

2. The water company will install standpipes at its own expense at convenient places, as may be hereafter agreed upon.

3. An additional 50,000 gallons per day will be furnished free to the city.

4. The extra water furnished to the city may be at a reduced rate. [186]

5. The city shall have the right to sprinkle night or day, as it sees fit, and a ten-minute service will be given.

6. The rate of interest on the investment may be reduced from 8% to 6%.

7. The Fire Hydrant clause will be amended so as to be more favorable to the city.

8. The pending action at law against the City Council shall be dismissed.

I shall have a new proposal drawn up embodying the above amendments which I shall submit to the Council with as little loss of time as possible.

I note what your committee says about the statutes and the courts and the authority of the City Council and I desire to point out to you that it is to avoid legal entanglements and a resort to the courts that I offer to make these concessions, and that I would not have to make an appeal to the courts to determine the value of the money that is now in my pocket.

Your committee asks me to invest \$150,000.00 or more unconditionally, and to have someone else hereafter tell me what it is worth. I am sure without going to law that it is worth \$150,000.00 now, and unless I have some assurance that it will continue to be worth \$150,000.00 I must decline to invest it.

In conclusion I hope that you will see that the amended draft cannot work any possible harm to the city or the water company's patrons, while it will grant me some assurance that I have the good will of the citizens behind me in this great risk which I am asked to assume.

Very truly,
JAMES A. MURRAY." [187]

July 2, 1908, p. —:

“Clerk read Ordinance No. 183 second reading fully and distinctly at length. The mayor declared Ordinance No. 183 to have passed its second reading, and stands for third reading.”

July 10, 1908, p. 453:

“The mayor declared Ordinance 183 stood for third reading, and directed clerk to read said ordinance for third reading fully and distinctly at length. Clerk read Ordinance No. 183 fully and distinctly at length for third reading. The mayor stated the question, shall Ordinance No. 183 receive its final passage as read, and directed the clerk to call the roll. The vote on the final passage of Ordinance No. 183 resulted as follows: Yeas, none; Nays, Bistline, Smith, Fuzz, Williams, Terrell, Houde, Chilson. The mayor declared the ordinance to have not passed.”

July 21, 1910, p. 54:

Mr. RUICK.—We object to the conclusions which are embodied in the minutes respecting Mr. Winter's answer.

The COURT.—Proceed.

Mr. HAWLEY.—The line, or fraction of a line, where the conclusion is, is not part of the minutes. To that part of it we offer a special objection.

The COURT.—Well, the Court will not be governed by improper conclusions. You may read in any of the minutes of the city council relating to this controversy; they will be considered for what they are worth.

“The council met in regular session with Mayor Church in the chair. The roll was then called and the following councilmen were present: Bistline, Garbett, Williams, Peterson, McCarty and Higson. Absent, Blohshied and Valentine. [188] The mayor explained the situation on the city water. As Mr. George Winter was present asked him to explain cause of shortage to the council. Mr. Winter addressed the council at some length. The other councilmen then asked Mr. Winter some questions relative to the water situation and to general conditions that existed, but in return was given very unsatisfactory answers to same.

Mr. Lowrie from Salt Lake City then addressed the council on the water shortage and explained that the insurance companies would have to raise rates in Pocatello if water continued to be shut off at night, but thought that if pressure was on at all times rate would not be raised.”

August 4, 1910, p. 56:

“Moved by Bistline, seconded by Higson, that the Fire and Water Committee wait on the Pocatello Water Company and ascertain if the Pocatello Water Company intend to improve their pipe-line and bring in the water from Mink Creek, and report at next regular session of the council. Motion carried.”

September 1, 1910, p. 60:

“The Fire and Water Committee reported that they waited on Mr. George Winter as requested by the council, and received little or no satisfaction.

Mr. N. P. Neilson then presented the council with a petition signed by many citizens and taxpayers and asked that same be read and kept on file. The clerk then read the petition and was ordered filed. Mayor Church explained the water situation, and the councilmen in turn gave their views.”

Then follows the resolution which was introduced in evidence during Mr. Higson’s testimony.

August 2, 1911, p. 131:

“George E. Hyde, President of the State Board of Health, and James H. Wallis, Idaho State Food and Sanitary [189] Inspector, were present and were requested to report their inspection of the Pocatello water system. Mr. Wallis then read the following report:”

(Mr. Clark asks to have this report marked as an Exhibit and introduced at this point as the report contained in that minute. Without objection other than the general one, said report was admitted and marked Complainant’s Exhibit No. 14.)

August 17, 1911, p. 139.

“The clerk then read communication from the superintendent, A. B. Stevenson, of the Oregon Short Line R. R. Co., offering the city the use of 24,000 gallons of water per day, during the temporary shortage of water, free of charge, providing the city would release the railroad from any and all liability.”

The following resolution was then introduced by Rhothas:

Be it resolved by the Mayor and City Council of

the City of Pocatello, Idaho, that

Whereas, it is impossible to procure from the Pocatello Water Company sufficient water for the purpose of sprinkling the streets of the said city; for the reason that the supply of the said Pocatello Water Company is not adequate for said purpose; and

Whereas, said City Council has requested of the Oregon Short Line Railroad Company, a corporation, that the said Oregon Short Line Railroad Company permit said city of Pocatello to take water from the water system of said Oregon Short Line Railroad Company for the purpose of sprinkling the streets of said city; and

Whereas, said Oregon Short Line Railroad Company has agreed to permit said city so to do, if said city will [190] release and discharge and hold said Oregon Short Line Railroad Company harmless if for any reason any person shall question said Oregon Short Line Railroad Company's right so to do;

Now, therefore, by this resolution said City of Pocatello, by and through its said city council and mayor, hereby agrees to hold and save the said Oregon Short Line Railroad Company harmless, and release them from and protect them against any claim or charge for damages, or upon any account, by any person or corporation whatsoever, on account of the furnishing of said water for said purposes, and grants to said Oregon Short Line Railroad Company

the authority and right so to furnish said water for said purpose.

Upon motion duly made and seconded the resolution was adopted by the following vote: Aye, Hansen, Trapp, Weideman, Rothas, Walton, Martin and Hutson; No, None; Absent, Doty.

There was a great number of citizens present for the purpose of discussing with the council the water situation, and at this time the acting mayor, Martin, gave those that desired the privilege of expressing themselves. A lengthy discussion ensued in which the council tried to find a way to secure immediate relief so that the city would not continue to be without fire protection. Upon request being made the clerk read in full the franchise given the Pocatello Water Company, under which the company is now operating.

Motion by Trapp and seconded by Rothas to empower to mayor to employ D. Worth Clark as special counsel for the city, and that Mr. Clark be instructed to take action in the courts at once against the Pocatello Water Company, seek such relief as is possible under the law. Voting, Aye, Hansen, Trapp, Weideman, Rothas, Walton, Martin and Hutson. No, none. Absent, Doty. The mayor declared the motion carried.

Motion by Trapp and seconded by Hutson to [191] empower the mayor to employ special officers to guard against violence or damage being done to the water supply or the reservoirs by the water company's employees, as threats to that effect had

(Testimony of D. W. Church.)

been made by Mr. Winter, the superintendent; also to employ an officer to guard against the waste of water in the city. Voting Aye, Hansen, Trapp, Weideman, Rothas, Walton, Martin and Hutson. No, none. Absent, Doty. The Mayor declared the motion carried.

Mr. RUICK.—I wish to note a special objection to that part of the resolution which stated that threats had been made by Mr. Winter.

The COURT.—That part of the resolution is stricken out.

(Witness resumes in reply to continued examination:) I draw the warrants for the Pocatello Water Company when they are paid for water service by the city. During my term of office all the bills had been allowed and paid. No unpaid bills had been filed with me prior to the time this suit was filed. All the bills that were filed were filed with me. The city was paying for more than fifty hydrants.

[Testimony of D. W. Church, for Complainant.]

D. W. CHURCH, called and sworn as a witness on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside in Pocatello and have for thirty years; am a bank cashier; have been member of the school board, city council and mayor, beginning my term in May, 1909.

(Witness then identifies his signature on report.)

I don't know how to take the measurement of water and don't know whether the measurements

(Testimony of D. W. Church.)

taken of Mink Creek were correct or not. Every year since 1905 practically there has been a shortage of water. Some years there were no [192] restrictions on the use of water and other years when it was dry they had to restrict the use of water, on account of not being sufficient apparently.

[Testimony of R. M. Wilson, for Complainant.]

R. M. WILSON, called and sworn as a witness on behalf of complainant, testified as follows:

Direct Examination by Mr. CLARK.

I have lived in Pocatello about three years and am a painter. In my neighborhood, corner of Whitman and Sixth, there must be twelve or fourteen cases where individuals have had to build private lines in the streets to connect with the Pocatello Water Company's system. I was compelled to build the line about 500 feet to get water into my house.

Cross-examination by Mr. RUICK.

I had no interview with the superintendent of the water company and made no demand on him myself; my son was in with me and he did that.

(By agreement of counsel, the testimony of J. M. Bistline, who was unable to appear in court owing to illness, was taken by deposition, at his home. Witness sworn by Theodore Turner, Deputy Clerk of the U. S. District Court for the District of Idaho. Plaintiff being represented by P. C. O'Malley and the defendant by N. M. Ruick.)

[Deposition of J. M. Bistline, for Complainant.]

Direct Examination by Mr. O'MALLEY.

I reside in Pocatello and have for a little over ten years; am a lumberman. At present mayor and have been for nearly two years. Was councilman six years continuously before being elected mayor. During all this time conditions relative to the water situation has been bad,—mostly during the summer months. During the Loux administration as a member of the special water committee I had an interview with Mr. Winter. I can only recall it in a general way. [193] I remember when the trouble first commenced in 1907 under the Loux administration. The first thing was the use of the fire hydrants for sprinkling purposes. There was a shortage of water in 1907 or 1908; I couldn't say as to both years, and there were sprinkling rules in effect. There was a shortage in 1905 and 1906.

I visited Mink Creek during the summer of 1907 or 1908. It is a good-sized stream and was nearly all running over the waste dam. The valve-house was locked and I couldn't tell whether the company was diverting any great quantity of water from Mink Creek. I think I have visited the water works at Mink Creek every summer since I have been here and I have found conditions practically the same. I went there in July and in August, 1911, specially to observe the water conditions and found them practically the same as before; there was apparently as much water flowing over the dam as was coming into the creek above.

(Deposition of J. M. Bistline.)

I was at Gibson Jack twice in 1911. The water company was taking all of the water out of Gibson Jack at that time; all the water that was coming into the dam was being diverted to the company's pipes. Parties with me measured the water. There was also water flowing into that from the Mink Creek pipes.

My recollection is we laid off the sprinklers on account of shortage of water at the water company's request. I visited the company's reservoirs in July and August, 1911. I think the first visit was between the 15th and 20th of July, and found the reservoirs empty. This was before the food and health inspectors came to Pocatello. The fire chief, chief of police and I went with them the first time they came to inspect the reservoirs. The upper reservoir was empty except a lot of mud; I should estimate a number of carloads of [194] mud. Where the water entered the reservoir from the pipes to where it flowed out at the opposite diagonal corner there was just a little creek flowing right through the mud. The middle reservoir was empty, except about four inches of water on the bottom, with a lot of mud and sediment in the bottom; the lower one was empty but was not so filthy as the other two.

As mayor I called a meeting of the council the evening the members of the board of health were here; that was August 2, 1911. The reservoirs were practically empty from the time the health officers were here until Mr. Martin and Mr. Green took charge,—eleven days. I kept an account of it but

(Deposition of J. M. Bistline.)

don't know how long before that.

The water was generally shut off in the night. I remember it was shut off in the day-time but think there was notice given for that. The water was entirely shut off from the city in the night at different times during 1910 and there was no water for the city for fire or other purposes.

In 1910 the city council passed a resolution notifying the water company that if they did not improve their system their franchise would be annulled. It was at the first meeting in September and I introduced the resolution.

(Witness identifies resolution.)

I don't know whether that resolution was served on the water company or not. I do know this, that when those minutes were read for approval at our next meeting Mr. Winter was there and heard them read. The resolution was read at that time.

On South Fifth avenue there was a block that had ten houses in it and the houses were occupied. I lived in the block adjoining and knew the circumstances well. It was more than three years from the time they first petitioned, all agreeing to take water, before they were granted a connection by the water company. [195]

In 1911, as mayor, I inspected the standpipes and found they would flow very slowly when turned on. I didn't see any reducers taken off but as mayor authorized the removal of them when I heard they were there. There were many complaints registered with me of unsanitary conditions in the private

(Deposition of J. M. Bistline.)

mains of the city. I requested the board of health to come, on these complaints of the filth in the water. I had investigated the reservoirs before making this request and found the conditions I have already testified to.

Cross-examination by Mr. RUICK.

Mr. Winter was not present at the meeting of September 1, 1910, when my resolution was offered and adopted. I understood that the chief of police was instructed to serve that notice; the resolution is in effect a notice. I have no knowledge of any service on the company except Mr. Winter being present at the next meeting. I purposely charged my memory with it that night. We have been fooled so often by Mr. Winter that I reached over when that was read to Mr. Garbett and said, "Mr. Winter can't well escape service in this case because there he sits hearing the minutes read." I spoke that to Mr. Garbett at the time, and by that charged my mind with it, just for an event of this kind, Mr. Ruick. I can't say that written notice had ever been given to Mr. Winter. I didn't rely upon Mr. Winter being present, but I did make the remark because he was there.

The first thing a council meeting does is to approve the minutes of the last meeting. When there is a special meeting we don't read the minutes of the regular meeting.

(Agreed by counsel that the resolution offered by Mr. Bistline and referred to in the beginning of his testimony as having been offered and adopted Sep-

(Deposition of J. M. Bistline.)

tember 1st, should be September 7th.)

(Witness resumes:) [196] The record does not show that the minutes were read and approved on September 7, 1910. It was an adjourned meeting. The meeting of September 12 is correctly denominated, "Regular adjourned session." I do not see that they show that the minutes of the previous meeting, September 7th, were read and approved. There is nothing in the record of the minutes, or the minutes of the meeting of September 12th indicating that the minutes of the previous meeting, September 7th, 1912, were read. I rely entirely on my memory. I can't name the date when Mr. Winter was present. It was the date when that particular resolution was read in the minutes. I can't find anything in the minutes of the city council showing that the minutes of the meeting of September 7th, at which time my resolution was passed, were read. I am just as certain about the presence of Mr. Winter as I was. I can't say the date of the meeting and find nothing in the record to aid; I am relying on my memory, for the reason that I particularly charged my memory that night with the fact. The minutes were read, because that is what suggested the thought to Mr. Garbett; I don't know when they were read and find no record of it. I realized that it would have no force unless it was brought directly to the attention of the water company and that a resolution passed by the city council and not called directly to the attention of the water company would be a vain thing. Either by order of the council or

(Deposition of J. M. Bistline.)

by order of the mayor, the chief of police was instructed to serve this notice. I don't find anything in the record showing that any person was directed to furnish the water company with a copy of this resolution, or give them any notice whatever of the resolution.

The water was shut off in 1910. In 1911 the insurance companies made a stir about it. The sprinkling [197] rules were given out by the water company, limiting lawn sprinkling to certain hours. It is my recollection that when the water was shut off the day-time notice was given and there was some publication of notice when the reservoirs were cleaned.

Mountain streams carry more or less silt and that mingled with the water and allowed to settle becomes mud. I would not consider it contrary to good policy and detrimental to the health of the people if the upper reservoir was designed and intended as a settling basin; I think a settling basis is necessary. I wouldn't like to give my opinion as to whether this stream of water trickling through the silt and carrying it with it would be detrimental.

Redirect Examination by Mr. CLARK.

In the eight years I have served upon the council the minutes of the regular meetings are always read at the next meeting, regular. The only meetings at which they are not read are adjourned and sometimes special meetings. All the intervening meetings are read at the next regular meeting. If the record fails to show that any of the regular meetings were not

(Deposition of J. M. Bistline.)

read the reason would be that the clerk made an error.

As mayor of the city in 1911 I was denied the privilege of inspecting the reservoirs of the Pocatello Water Company and was forcibly ejected from the reservoirs, under the order and personal direction of George Winter on one occasion and on two other occasions the man in charge tried to do it.

During the eight years I have been connected with the city there was one or two years which were very wet and we had little if any complaint. All the balance of the years we had trouble every year. The cause I believe was shortage of water.

[Testimony of Bert Stoker, for Complainant.]

BERT STOKER, a witness called and sworn on behalf [198] of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at Pocatello and am bookkeeper for the Tribune Company, a daily paper published here. I know Mr. George Winter and think the "Tribune" is delivered to him every day; his name has been on our records for several years. I think it was on the record in 1910.

(Paper marked Complainant's Exhibit No. 15 identified by the witness.)

That is an issue of the Pocatello "Tribune" published on September 7, 1910. I don't think there has ever been any daily paper published in Pocatello outside of the "Tribune."

(Testimony of Bert Stoker.)

Mr. CLARK.—I am going to offer Complainant's Exhibit No. 15.

Mr. RUICK.—I would like to interrogate the witness.

Q. (By Mr. RUICK.) (Witness replies:) I have no personal knowledge that that paper was delivered to Mr. Winter during the time his name was on our list. I have no knowledge that this issue ever came into his possession.

Mr. RUICK.—We object to this as incompetent, irrelevant and immaterial, for any purpose. I assume that it is offered for the purpose of implying notice. This party has no personal knowledge. It would be the merest hearsay.

The COURT.—What have you to say, Mr. Stoker, that you think the paper reaches Mr. Winter? Is he a subscriber?

A. His name is on our regular list, and the carrier has instructions to leave it there every night.

The COURT.—On the list like every other subscriber? A. Yes, sir.

The COURT.—The objection is overruled. [199]

Mr. RUICK.—We don't have to note exceptions, do we?

The COURT.—Oh, no.

[Testimony of George Gittins, for Complainant.]

GEORGE GITTINS, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside in Pocatello and am county commissioner of Bannock County. I have the contract for sprink-

(Testimony of George Gittins.)

ling the streets of Pocatello, took it May 1, 1907. We got water then through the standpipes from the Pocatello Water Company. When I first started in I could get plenty of water but two weeks after I got the contract reducers were put in. This was about the 15th of May. When the men stopped work at six o'clock at night there was a good flow of water but when they started in at seven o'clock in the morning there wasn't any.

(Exhibit No. 13 identified by witness as a reducer.)

The flow of water was the same from all the standpipes as from the one this came out from. I saw some of them taken out but not all. They were in from the 15th of May, 1907, until the spring of 1911. It took all the way from fifteen to forty-five minutes to fill a wagon. Without the reducers it took from two to five minutes. The effect of this was I couldn't do the work, couldn't get over the ground, couldn't fill the wagons. It took from five to fifteen minutes to empty a wagon. In the spring of 1910 I had some conversation with Mr. Winter about it. He asked me if I was going to bid on the sprinkling and gave me to understand it was going to be still worse this year than the year before and that I would have to be careful about bidding. I think fourteen standpipes had reducers in. I didn't know anything about it only the men were phoning and coming to the house and said they couldn't get water. [200]

[Testimony of Lyman Fargo, for Complainant.]

LYMAN FARGO, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside at 144 South Garfield Avenue, Pocatello, and am a merchant. I remember there was a decided shortage of water in the summer of 1911. There wasn't sufficient to irrigate the lawns and trees and a great shortage at certain times for domestic use. There was several times that year that I was unable to flush the toilette in my house, or to get enough water for a bath at times. I think that situation existed for a month or six weeks. In company with others I inspected the lawns of the city that year to see what the condition was and found many of them dry and the trees suffering for lack of water. I have lived in Pocatello over twenty years. A great many years for the past ten years there has been a decided shortage of water.

Cross-examination by Mr. RUICK.

I didn't take note of the times in the day or night that I couldn't get water for baths. I know the water was shut off at night in 1911. I don't know whose order it was.

Our committee went around practically all sections of the city. Many of the shade trees were practically bare. I think this was in August. Mr. Turner, Mr. Cleare, Mr. Budge and myself were the committee.

[Testimony of J. A. Standley, for Complainant.]

J. A. STANDLEY, a witness called and sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. CLARK.

I reside in Pocatello and am a plumber.

(Witness identifies two exhibits.)

These are fibre washers for bib seats; they can be used as a reducer and are sometimes known as reducers. I have seen reducers similar to these used in connection with the Pocatello Water Company's system. They are in general use all over [201] the city. They are used in the corporation cock at the mains that divert water into the service main for the individual pipes of the citizens. Two of these quarter-inch fibre washers with a brass washer between to make a complete tight joint are placed in a half-inch pipe; then where these washers are used all the water obtained by the person who uses water from the service pipe has to go through this opening.

Mr. CLARK.—We offer this in evidence.

Mr. RUICK.—Of course we object to that as incompetent, irrelevant and immaterial. It doesn't even pretend to serve the purpose you claim. He says similar to that.

Mr. CLARK.—He said the same size.

Mr. RUICK.—He didn't say one like that. If it is one like that, a duplicate of that, all right; if not we object to it.

The COURT.—I understood him to say it was the same size and the same material. You say it was the

(Testimony of J. A. Standley.)

same size and material?

WITNESS.—Yes, sir, same size and material.

The COURT.—And the same form?

WITNESS.—Yes, sir.

The COURT.—The objection is overruled.

(Said contrivance was marked Complainant's Exhibit No. 16.)

(Witness resumes:) This reduces the flow of water to the amount that will go through that opening. The mains are under control of the water company but Green and Higson does their work. There is an injunction against me from interfering with their work at all. I can't take these out when I find them. I am familiar with about eight hundred of the service-pipes in Pocatello. I have seen Green and Higson putting the reducers in. They were put in all over the city about six weeks ago. [202]

Cross-examination by Mr. RUICK.

I have lived in Pocatello twenty-one years and been engaged in the plumbing business all but one year of the time. My brother, M. L. Standley, is my partner. I was defendant in a suit brought by the Pocatello Water Company to enjoin me from interfering with their water mains. The Supreme Court affirmed an order of injunction against me, restraining me from interfering. I have had no feeling against that company since that time and haven't any now. Their action curtailed my business in some instances and in others it boosted it. I wanted the privilege of connecting with the water mains and it curtailed my business as far as tapping the mains

(Testimony of J. A. Standley.)

was concerned, entirely. I believe this was in 1898. I have since been restrained from tapping the water mains of the company, as a plumber, or interfering in any way at all except Mr. Winter gave me permission to turn off and on in the general repairing of hydrants and work. He didn't allow me to connect with the mains or approach them. The decision precluded me from having anything to do with the mains between the curb line and the mains except by permission of the water company. The Supreme Court held that the water company held the exclusive control of those mains in that regard. I didn't produce a reducer taken from the pipes because I had no access to them. I know of my own personal knowledge of over eight hundred pipes that have these reducers in them. In passing along and *restling* work I would visit along where they were working and see what they were doing. There is a stop-cock screws in the main, and there is a pipe that screws on to the stop-cock, and a third piece that is wiped on to the tail piece, and the tail piece acts as a union, and the stop-cock is screwed into the main. It was no part of my business to inspect these pipes to ascertain whether they contained reducers; I was never in the pay [203] of the city for doing this work or employed by the city for that purpose. From observations made by me in passing where work was going on I am able to say that eight hundred of the pipes and connections with the water mains contain these reducers. I have observed as many as a dozen in a day. Just did this casually like any other citizen,

(Testimony of J. A. Standley.)

stopped and made observations. My purpose was to get any information that would be good for me; in this way I learned how these were made; you can learn something on every one. I never took one of them out and handled them. A reducer is just like a seat for a bib. I had plenty of these in my shop and didn't have to make any observations to know how they were constructed. My motive was to see what they were doing, how they were getting on, to see if I could learn anything new. I wasn't doing this because I had any motive in spying on the company and I had no ill-will against the company because they had prevented me from doing this work. I spent this time just to see if I could get something that would benefit me in my work.

Redirect Examination by Mr. CLARK.

My entire business during the past fifteen years has been the plumbing business and doing plumbing in connection with the Pocatello Water Company's system.

Plaintiff rests. [204]

CITY OF POCATELLO,

vs.

JAMES A. MURRAY et al.

[Testimony of F. O. Leonard, for Defendants.]

F. O. LEONARD, called and sworn as a witness on behalf of defendants, testified as follows, on

Direct Examination by Mr. RUICK.

I reside at 619 North Arthur, Pocatello, Idaho; have made this my home practically twenty years.

(Testimony of F. O. Leonard.)

Am a chemist and assayer; thirty-one years old. I attended high school here one year, the following year attended Weiser Academy, took a year at Whitman Academy, spent two years at Whitman College, then entered Northwestern University, worked in Northwestern Medical School and Chicago School of Assaying. I was at Northwestern three years. I took a special course at Northwestern in food and drug analysis, especially with the State work, inspection, state chemist. I just took special work at Northwestern Medical School in bacteriology and pathology. I consider myself qualified to make analyses.

I have made a number of analyses of the water supplied by the Pocatello Water Company to the city and inhabitants of Pocatello. The first ones in the spring and middle of the summer of 1910, I think. It was mainly to determine the purity of the water for my own personal satisfaction and there was no record kept. On August 15, I think, 1911, I made an analysis for the water company; the day after I made an *analysis city* mains for my own benefit; following that I made an analysis for Jones, the city health officer. I don't know the date but it was after the other two. The sample for the water company was taken at the outlet of the upper reservoir. The day the sample was taken, there was a number of inches of sediment in the reservoir. The water was coming in at the upper side and cutting diagonally across and it cut a channel [205] through the sediment. The sediment on both sides was practi-

(Testimony of F. O. Leonard.)

cally dry and the channel was cut clear down to the bottom, practically. This sample was taken at ten-fifty A. M., August 15, 1911. I don't know about the reservoir being cleaned; I know the sediment was still in the bottom.

In making the analysis I didn't expect to find any contamination from sewage, so we naturally would make it for organic material. It is necessary to know something of surrounding conditions, but, knowing those, we make the analysis with reference to organic material, especially nitrogen producing organisms like decayed vegetable matter, so with that in view we made an analysis for free ammonia, the albuminoid ammonia, oxygen required to oxidize organic matter, the nitrogen in nitrites, and the nitrogen in nitrates, chlorine, total hardness, temporary hardness, permanent hardness, total solids, mineral matter, organic and volatile matter. This is the standard analysis of water generally used by such authorities as Stillman. In reporting analyses it is customary to report the parts in a million by weight, that is, the parts of material found, and also by gallon, the grains per gallon. I pursued the usual method. Of the free ammonia there were .016 parts free ammonia in one million parts, all of these are now. The albuminoid ammonia .0192. The oxygen required to oxidize organic matter was .335. Nitrogen in nitrites, none. Nitrogen in nitrates, a slight trace. Chlorine, 10. The total hardness was 142. The total hardness is reckoned on soap-consuming power. It is divided

(Testimony of F. O. Leonard.)

into soft water, moderately soft, hard and very hard. This water would come under moderately hard water. The hardness is due to carbonates mainly in this water, calcium carbonate, which upon heating is thrown out of solution, that is, it is known as temporary hardness because the carbon dioxide is liberated in making the [206] precipitation. The grains per gallon of free ammonia were .00092. The albuminoid ammonia was .0011. The oxygen required to oxidize organic matter was .01943. The nitrogen in nitrites, none and in nitrates, none. The chlorine was .58 of a grain. Total hardness was 8.04. Temporary hardness 4.75. Permanent hardness 3.48. The total solids 8.35. Mineral matter was 7.65. The organic and volatile matter was .7.

This would be called pure water, meaning that it is not polluted.

I have had previous experience in analysis of water for municipal purposes in Chicago, especially with Lake Michigan water and am familiar with results of tests of this character in other cities.

Mr. CLARK.—I desire to enter a general objection to all of this testimony as being immaterial.

The COURT.—Overruled.

The analyses made for myself the following day were of samples taken from the hydrant on Arthur and Center, near the Electric Light Company, and on North Main by Cleeman & Hall Hardware Company. The hydrants were allowed to run some little quantity before the samples were taken. The result of the analysis was practically the same as that taken

(Testimony of F. O. Leonard.)

from the reservoir, there was a little variation in a thousandth place in regard to ammonia, and the nitrites and nitrates were the same. The free ammonia was .0144 and the albuminoid was .0396. This sample was taken at one-thirty P. M. August 16, 1911. I completed the analysis the same day.

The work for the city was following the excitement in regard to the poisoning of the waters reported. Dr. Jones, city health officer, asked me to take samples. The samples were taken from the same two hydrants, also from one or two [207] places along Center Street where the Reception Saloon was, from private hydrants, from my own laboratory, from the Cook Drug Store, from three hydrants, three private lines and two mains. I don't recall the date, but my impression is it was the day following the great excitement about the poisoning of the waters in the reservoirs. The analysis was completed the same day the samples were taken. I only tested for ammonia, and nitrites and total hardness; the others were, immaterial, and they were practically the same. There might have been a slight variation. On addition I tested for the various poisons, as potassium cyanide, and also bacteriological examinations. It was reported that there were typhoid cultures put in and we made analysis for that. We didn't find any, or any mineral matter or anything detrimental. It was much above the average of purity as a water. I did not find anything in the water in all these tests that was calculated to produce disease.

(Testimony of F. O. Leonard.)

Cross-examination by Mr. CLARK.

The test made on August 15th was at the request of Mr. Gray, attorney for the Water Company. I went with him directly to the upper reservoir. I don't know whether the two lower reservoirs had been cleaned at that time or not. The water was flowing directly out of the upper one and coming to the town. They were all three practically dry as I remember, only as I went by I just looked over. We found a stream with defined banks flowing down through the reservoir. We took the sample at the outlet from the center of the stream midway between the top and the bottom. The next day I took samples from the hydrants. I don't know anything outside of the analysis. [208]

(Mr. Ruick offers in evidence copy of report to city council by former city engineer, J. P. Congdon. Mr. Clark objects as incompetent, irrelevant, immaterial and not the best evidence and that it has not yet been shown that this report truly states the facts. After discussion the Court asks counsel to state specifically the purpose for which it was offered.)

Mr. RUICK.—We offer this for the purpose of showing one step in the negotiations, as the Court has termed them, between the city and the Water Company, in other words, the transactions and dealings between the parties, and the correspondence back and forth on the subject of water supply and things pertaining to it, the purity and impurity of the water, and those questions; not for the purpose of proving those facts, if the Court please, but for the

(Testimony of H. C. Meyers.)

purpose of showing that the city, for instance, was apprised of conditions by its own officers, by the city engineer, that it was apprised of conditions by one of its own officers. To that extent we deem it entirely competent to show that the city was apprised of it. All this evidence has been introduced here showing that the water company was apprised of certain conditions and that they were called to their attention by the city council. If it goes no further than that, than that the city was apprised by the official report of its own engineer as to conditions from his standpoint, that is all. We offer it for that purpose, your Honor, not for the purpose of proving as a fact the statements therein contained.

The COURT.—As I understand it, it is offered now within the ruling, and it is received.

(Said document was marked Defendant's Exhibit No. 2.) [209]

[Testimony of H. C. Meyers, for Defendants.]

H. C. MEYERS, called and sworn as a witness on behalf of defendants, testified as follows, on

Direct Examination by Mr. RUICK.

I reside in Boise and am in the photography business and have been for about twenty years. My work has taken me around the State a great deal. We have done the work for the Oregon Short Line throughout Idaho, for a great many promoters, irrigation companies, and so on, and have made a specialty of scenic views. In the latter part of September, 1911, I was employed by the Pocatello

(Testimony of H. C. Meyers.)

Water Company to take certain views in Pocatello.

(Witness identifies photographs.)

These are pictures made all over Pocatello showing the use of water, and vegetation. Some views show pools of water in the street. They represent conditions existing in Pocatello with respect to vegetable growth, trees, lawns and gardens. I don't remember the names of my assistants. Mr. Marston was with us a good portion of the time and kept data as to the location of these different views.

[Testimony of R. J. Hayes, for Defendants.]

R. J. HAYES, called and sworn as a witness on behalf of *complainant*, testified as follows, on

Direct Examination by Mr. RUICK.

I have resided in Pocatello about twenty-five years and am an extensive property owner here, a member of the firm of Franklin & Hayes. I don't know of any trees having died as a result of the scarcity of water; I never lost any or had any lawns ruined on that account. My residence is 217 South Arthur Avenue; the lot is 60 by 140. I have seen the water out in the streets where it had been allowed to run from the taps of the Water Company.

Cross-examination by Mr. CLARK.

I never saw any general condition of this kind. In some particular instance some person had let his hose run and [210] it had gotten in the street. I couldn't say when it was. In the warm months there is a scarcity of water, I believe. My lawns have needed more water at times than they had. I

(Testimony of R. J. Hayes.)

have seen the leaves off the trees in the early part of the season before they would naturally fall; it looked as though they didn't have enough water. I think a lawn could live and yet not be properly cared for by having sufficient water. The purpose of the lawn is to beautify the residence. Grass will live to a certain extent without beautifying the residence. In 1911 my own lawn didn't suffer very much for water; I saw others that looked as if they needed more water. I couldn't say whether my trees were injured or not; they were not injured so far as I know.

[Testimony of N. G. Franklin, for Defendants.]

N. G. FRANKLIN, called and sworn as a witness on behalf of defendants, testified as follows, on

Direct Examination by Mr. RUICK.

I have lived in Pocatello about twenty-five years; am a member of the firm of Franklin & Hayes and own a home here, with lawns and trees surrounding it. I have never had any trees die by scarcity of water; I have had the lawns dry up in spots. I have seen some water running or standing in the streets, carelessness of people that were using it, let it run over.

Cross-examination by Mr. CLARK.

I don't recollect any particular instance; of course it was during the irrigating season. There has been a shortage of water for many years in the summer time here.

Mr. RUICK.—We didn't go into that question, if your Honor please. We object to that.

(Testimony of N. G. Franklin.)

The COURT.—I am inclined to think that is true. You didn't do so far with this witness as with the other. [211]

Mr. RUICK.—No, we didn't offer him for anything except his own premises.

The COURT.—If there is any doubt about it, I will have the reporter read his notes, but as I remember it Mr. Ruick's contention is correct.

Mr. CLARK.—Then, your Honor, I am willing to submit to that if that is the understanding of the Court.

(Witness resumes:) My own lawn didn't suffer, because I tended to it myself. Whenever they gave hours to irrigate I quit cutting the lawn and that protected it; it don't take so much water as when you keep it short.

Q. You would have preferred to have cut it? It would have made a much better looking lawn if you had cut it?

Mr. RUICK.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

(Witness resumes:) If there had been plenty of water I surely would have cut it, and kept it green; I was trying to keep it alive by letting it grow. I took personal care of it most of the time and did that for the purpose of getting enough water to keep it alive; I could trust myself better than anyone else.

Redirect Examination by Mr. RUICK.

I attended to my lawn and kept it alive and green. I think some leaves fell off from one tree

(Testimony of H. C. Meyers.)

during one summer before it was time.

(Certain photographs were marked Defendants' Exhibit No. 3 to Defendants' Exhibit No. 52, both inclusive.)

**[Testimony of H. C. Meyers, for Defendants
(Recalled).]**

H. C. MEYERS, heretofore duly sworn, upon being recalled, testified as follows, on

Direct Examination by Mr. RUICK.

These views were taken all over Pocatello on both [212] sides of the Oregon Shore Line tracks. I have no memorandum of the exact date upon which the views were taken.

Cross-examination by Mr. CLARK.

They were taken about the last of September. There hadn't been much rain. I suffered intensely from hay fever while I was taking those on account of the dust. I am not prepared to say there was no rain. It is quite possible that dust rises here within a day or two after a rain. Mr. Marston, an employee of the Pocatello Water Company was with me most of the time. I took pictures of the places he designated and no others. On Defendant's Exhibit No. 52, I think the foliage is fresh, its leaves stand in an erect manner. I don't know whose house it is or where they get water. 51 is a picture of the cemetery. A number of leaves have fallen. 50 is a picture of the courthouse lawn. It would be pretty difficult to say how many leaves had fallen from trees. 49 is a picture of someone's back yard.

(Testimony of Edgar L. Marston.)

The COURT.—I don't know just how this is cross-examination, Mr. Clark.

Mr. CLARK.—Well, perhaps it isn't.

[Testimony of Edgar L. Marston, for Defendants.]

EDGAR L. MARSTON, called and sworn as a witness on behalf of the defendants, testified as follows, on

Direct Examination by Mr. RUICK.

I am twenty-eight years old; have resided in Pocatello a little over two years and been an employee of the water company nearly two years. I accompanied Mr. Myers when exhibits 3 to 52, inclusive, were taken and recognize the photographs. They were taken on three different days—September 23, 1911, was the last. We visited all parts of the city as near as I can recollect.

Cross-examination by Mr. CLARK.

I am bookkeeper for the Pocatello Water Company. I designated to the photographer the views he should take. Mr. [213] Winter and I had not been over the ground prior to that time, no one else had. Our purpose was to show the general state of the gardens and trees in the city. This was done at Mr. Winter's request. I don't know what we were going to do with them after they were taken.

Redirect Examination by Mr. RUICK.

(Witness asked to identify exhibits.)

No. 34 is a view on South Third. 32 is a view on North Fourth—I think Mr. Swanson's place. No. 29 is a view on North Sixth. No. 28 is John Fader's

(Testimony of Edgar L. Marston.)

place on South Third. No. 27 is a view of the Academy grounds. No. 26 is a part of Swanson's property. No. 25 is a tree view, 242 North Fifth. No. 24 is a street view on North Harrison. I think this is Swanson's garden and is irrigated from the city water company; I won't swear to it. No. 23 is 449 S. Seventh. No. 22, street view on North Garfield. No. 21 is a view in the 300 block on South Seventh. No. 20 street view on North Arthur. No. 19 street view, East Lewis street. To the best of my recollection No. 10 is a garden view on North Fifth. No. 10 is a garden view on South Sixth. No. 5 is a garden view on North Fifth. No. 36 is a street view on South Ninth. No. 37 is a street view on South Arthur. No. 38 is a street view on North Main. No. 39 garden view, 820 North Main. No. 40 view of the city. No. 41, street view, South Main. No. 42 garden, North Seventh. No. 43 Italian garden, North Fifth. No. 44, garden view North Seventh. No. 45 Academy grounds. No. 48 South Eighth. No. 51, cemetery. No. 50, courthouse grounds. Mr. Fargo's residence is on South Garfield, shown in Exhibit No. 22.

I think there was frost before these pictures were taken. We were in a hurry to take them before the leaves fell on account of the frost. This picture of Seventh Avenue looking south shows water standing in the road. [214]

Recross-examination by Mr. CLARK.

I did not follow the water to its source to see where it came from. I didn't know at the time that

(Testimony of Edgar L. Marston.)

the inhabitants on this side of town were pumping water from the city ditch for the purpose of watering their lawns. I didn't know Mr. Theodore Turner pumped water during that entire season for the irrigation of his lawn on South Seventh. I knew Carl Valentine pumped water some of the time. There is not many on South Seventh that I know of that use windmills and private sources of supply for water for irrigation. I don't know of any. I know Mr. Gerber on the east side of town has a private supply of water and had it during 1911. I haven't any picture of his place here. To the best of my recollection this large garden, No. 26, is irrigated from the Pocatello Water Company's system. I do not know. The water for the irrigation of Lombardy's place was procured from the city mains. There may be two or three company houses shown on Exhibit 24. The railroad company houses don't procure water from the city. There are some places in town that don't. The Academy lawn was green and in good condition.

(Here the Court questions witness in order to locate the Fargo residence.)

(Witness replying to Mr. Clark's question:) These pictures do not show any lawns that were dry or burnt or any gardens that had suffered for want of water to my recollection.

**[Testimony of H. C. Myers, for Defendants
(Recalled).]**

H. C. MYERS, being recalled, testified as follows:

Direct Examination by Mr. RUICK.

I have a place, thirty-five acres, a mile south of Boise on the Bench, where I raise some fruit and vegetables. I am an irrigator. At the time of taking these photographs I [215] got an idea from observations of the condition of the lawns in a general way. I wouldn't have thought anything had suffered materially for want of water. Of course we didn't pay attention, we weren't looking for dry spots; we looked for luxuriant gardens and found them. We could have made a number of times this many pictures that would have shown good vegetation.

Cross-examination by Mr. CLARK.

We were looking for luxuriant gardens and made pictures of the best ones we saw. We could have made a great many more. My understanding was that we were only shown gardens that used what I believe to be city water. I am not familiar with the localities and know nothing about it; I didn't investigate to find out what they were using.

[Testimony of A. B. Bean for Defendants.]

A. B. BEAN, called and sworn as a witness on behalf of defendants, testified as follows, on

Direct Examination by Mr. RUICK.

I have lived in Pocatello since 1888 and was at one time mayor of the city. I have owned a home and

(Testimony of A. B. Bean.)

home premises here since about 1891. I have a lawn and trees and use Pocatello Water Company's water. I have never had any trees die on account of scarcity of water; I have been able to get water whenever the trees and lawn needed it.

Cross-examination by Mr. CLARK.

I am in the mercantile business. I do not do a great deal of business with the Pocatello Water Company. Mr. Green is a partner of ours; I don't know, only by inference that he is plumber for the Pocatello Water Company. He doesn't get any of his plumbing supplies from our store; he supplies them all himself. If he wants a pound of nails or anything of that kind he comes there and gets it. My place is [216] at 205 South Arthur. We have had a shortage of water. I always got enough to irrigate my lawn properly; it caused me a little trouble to be able to sprinkle at inconvenient hours. We had a reducer in our service pipe. I have two lots, nearly all irrigated except what was covered by barn, shed and house. I always had plenty of water.

[Testimony of George A. Green, for Defendants.]

GEORGE A. GREEN, called and sworn as a witness on behalf of defendants, testified as follows, on

Direct Examination by Mr. RUICK.

I have been a resident of Pocatello for about twenty-five years and have been engaged in the plumbing and steam-fitting business here for about eighteen or twenty years. I have done more or less work for the Pocatello Water Company during all

(Testimony of George A. Green.)

that time. I have never been in their employ as a salaried employee. I am a member of the firm of Green & Higson, and they employ me to do work for them. As a plumber I have been acquainted with the works of the Pocatello Water Company ever since they were put in. In the construction period I worked on all of it. Mr. Winter had charge of it and I worked under Mr. Winter's supervision. There are three reservoirs, lower, middle and upper. Water comes from Cusick, Mink and Gibson Jack Creeks—is discharged from the upper reservoir which acts as the first settling basin. It goes from the upper into the middle and from that into the lower reservoir. The water discharges into the top of the upper reservoir, and is drawn out of the top of that, so that it gives a chance for everything to settle, and then goes to the middle reservoir, and is drawn out of the top of that so that gives a chance for everything to settle, and then goes to the middle reservoir, and the same operation is done there, and goes from there to the lower reservoir and is drawn from the lower reservoir into the city mains. The lower reservoir produces 115 pounds pressure in the city, the middle, between 145 and 150. I never [217] put on the pressure from the upper reservoir; the plumbing wouldn't stand it, the main wouldn't stand it. The pipes connecting with the reservoirs are so arranged that the water can be discharged from the upper into the center, from the center into the town, discharged from the upper into the lower. They are so connected that one can be cut out at any

(Testimony of George A. Green.)

time, independent of the others. Any one of the lower reservoirs can be cut out and the city supplied. The city could not be supplied directly from the upper, the pressure would be too great.

About August 13, 1911, I was called on to clean the reservoirs. The lower reservoir had very little sediment in it; there might have been two inches over where the water dropped into it, down to about nothing where the water goes out. This was just natural sediment, termed silt, what is in the creek bottom that the water travels over, travels in suspension in the water. There might have been an inch and a half of sediment at the outlet and two and a half or three inches where the water came in in the middle reservoir. The lower reservoir is about nine feet deep; the center clears about eleven or twelve feet of water and the upper is about eight. The upper reservoir being the first to receive the discharge from the creeks at the time of high water, there is considerable sediment washed in there. There might have been from three to four inches at the outlet where the water discharged into it, and in a small part, where the wash of the water comes, there might have been two and a half or three feet there. There is a great deal of gravel washed in there from Cusick Creek at the time of the flood waters. The deposit was gravel and silt.

Cusick Creek at this time of the year when the snow is going off, will supply water to the entire City of Pocatello. [218]

(Testimony of George A. Green.)

Mr. CLARK.—I move to strike out the answer as a conclusion.

(Witness resumes:) I have known it to supply the city independent of Gibson Jack or Mink Creek. Gibson Jack some seasons will take care of the city most all the season, and then we draw upon Mink Creek when the water in Gibson Jack gets low. In fact, the water of Mink Creek flows in all the time, and what is not used in town comes down over the spillway. I had to do with the construction of the intake line from Mink Creek to Gibson Jack Creek. Any time there were repairs on the line we would go to the headgate and shut the valve off. The line is between six and a half and seven miles long. These repairs would not intentionally be made at a time when it would interfere with the city water supply. The intention of the water company was to always keep that line in good repair and to make the repairs at such times as the town could be supplied from Cusick Creek when they were repairing the Gibson Jack line and from Gibson Jack when the Mink Creek line was being repaired. Sometimes there might be a break in the line during the season otherwise than that when it would be necessary to shut off for a few days to make repairs. The water company has a man that goes to the reservoir every morning and reports the flow of the water, and any time the water is not showing a full flow I am notified and I go over the line and see where the shortage is, and make the repairs if necessary. There are valves in every gulch from Mink Creek to Gibson Jack;

(Testimony of George A. Green.)

to drain the line and draw off any sediment there may be in the line. On the top of the rises there are air valves to give the line air so that it will flow free. During all the time I have worked on the company's pipes the water has never been allowed to go to waste for any length of time without repairs being made. [219]

I have made connections for the water company of services pipes from about since the existence of the company. There was a time when other plumbers made connection but lately we have made them all.

The reducers are inserted in what we term the corporation cock next to the main. That is the shortest travel of the water. The tap on the main is half inch. The lines run half inch, sometimes three-quarters, sometimes larger, and this equalizer is put in at the connection, at the main. All service pipes have the equalizer on them. The reducers were put in for the purpose of what we can balancing the system, that is to equalize the pressure. When there are several standpipes on one lateral line with a full two-inch opening, with them all open at the same time it would reduce the pressure so that the other individuals on the line wouldn't get efficient service, where these standpipes are open, and to obviate that, and to equalize or balance the pressure, these equalizers are put onto the standpipes, so that the water traveling in the main would be of sufficient quantity to give everybody an even pressure. I mean by two or three of the standpipes

(Testimony of George A. Green.)

being opened at once, three different sprinkling wagons getting water at three different standpipes on the same laterals. These laterals are laid in the streets running north and south, the full length of the system. There are as many as three standpipes on one system and it is possible for all three to be opened at once. The company tried closing down the valves first and it wasn't satisfactory, then they put in these equalizers in the pipes and took the sprinkling barrels and made a test of the length of time it would take to fill them, trying to get it uniform, a uniform size that would give satisfaction and at the same time would leave the water in the mains with sufficient pressure so that everybody would get the required amount. The aim [220] was to maintain an even pressure in the mains, and to fill one of the sprinkling wagons in from eight to ten minutes. Experiments were conducted before this reducer was finally adopted and the reducers were put in all the standpipes.

Cross-examination by Mr. CLARK.

I recollect getting the reducers ready at the shop and having some of the men put them in. I don't think they were put in in the night-time. I wouldn't say positively; it might have been after five or six o'clock in the evening. I don't know that they were put in in the dead hour of the night; I don't think they were. I very often put men on jobs and go home; the time they work I don't know exactly. I put one in at Parley Byrton's (?) corner, in the afternoon. I put it in at the top. I believe they

(Testimony of George A. Green.)

were all put in at one time. I don't know exactly whether it was daytime or night-time. We put the reducers in every time a tap is made and have done so for several years; it might be five or six. I have been plumber for this company about eighteen years. We never found reducers necessary and the system worked all right without them before. We concluded to put them in because the town had grown considerably and it was a case of equalizing the pressure, equalizing the amount of water the people received. The person receiving water when the equalizers were put in could receive the same amount they did before but not in the same length of time. If the sprinkling hours were limited to two hours the person receiving couldn't get as much water in that period as he could before the reducers were put in. The sprinkling wagons couldn't be filled as quickly with the reducers in the standpipes as it could if the reducers had not been put in. The standpipes were used a good many years without having reducers in them. The reducers were put in upon the water company's orders. Complainant's Exhibit No. 16 is not one of the reducers. We use a brass [221] disc with a larger opening.

(Reducer offered in evidence and marked Complainant's Exhibit No. 17.)

(Witness resumes:) All the water the users receive from the service pipes of the water company passes through the opening that appears upon this metal disc. All the service lines have them excepting those for fire protection. We put in the re-

(Testimony of George A. Green.)

ducers as the taps were made and in cases where taps had existed before we went over and put them in. Complainant's Exhibit 13 are the reducers we put in the standpipes. I believe there is some laterals that has only got one standpipe. We put reducers in those also.

Redirect Examination by Mr. RUICK.

In the water system we have what we call the mains going east and west across the town, and the laterals are coupled on to these mains at each side. One main is down at the extreme south end of town, and the other is at the north end of town, and to equalize this pressure between the two, so that the parties in the center would get the same flow of water, that is, get a full flow, these were put in to what we call balance the system up. In other words, with a full connection, full half inch connection on the main, there are so many of them between the two main supplies that the parties in the center wouldn't have the same pressure that they would at the ends, and with these reducers in the pressure is balanced so that the main carries the full 115 pounds all the time, and it gives them an equal pressure all the way through, as nearly as possible.

Recross-examination by Mr. CLARK.

It pro-rates the water between them.

[Testimony of George Winter, for Defendants.]

GEORGE WINTER, a. witness duly called and sworn on behalf of the defendants, testified as follows, on **[222]**

Direct Examination by Mr. RUICK.

I am a civil and hydraulic engineer and manager of the Pocatello Waterworks; reside in Pocatello and have continuously since 1894, I think. Have been superintendent and manager of the Pocatello Waterworks since the end of 1895, two or three years after the inception of the work. At the present time the company is James A. Murray, doing business under the name of the Pocatello Water Company.

I am a specialist in hydraulic engineering. My first studies in civil engineering was at Cooper's Hill, London, England. From there I went to British India, and had to pass a severe examination to obtain entrance to what is known as the Royal Bengal Civil Engineering College, situate at Rurki, British India; it is situate about 100 miles northeast of Delhi, ancient capital of Bengal. After a two years' course there—I think I finished in two years—I passed my examination successfully and was appointed on what is known in British India as the Public Works Department, the principal business of which is water engineering. At that time irrigation was perhaps carried on in India to a greater extent than in any other country. I specialized on hydraulics in my college studies at Rurki and in my practice afterwards on the public works department, under older

(Testimony of George Winter.)

and more experienced engineers than I was at that time.

I know I am qualified as a civil and hydraulic engineer and competent to speak relative to municipal water plants and municipal water supply. I have read up on the subject as well as studied and practiced it.

I have directed all the construction work that has been done since I came here. When I came here the company had two holes that were answering for reservoirs; one is what is known now as the lower reservoir, the other is known as the upper [223] reservoir, but beyond being in the same locations there is no comparison between them at this time and the time when I first came here. The upper reservoir was merely an excavation, it would not hold water to any great depth, I don't think I ever knew it to have over 18 inches or maybe two feet—for the reason that it percolated through. It was not concreted at that time, was just a hole in the ground. It was squared and straightened and the sides and ends excavated, I think, some ten feet deeper, so that really the top of the present wall of the upper reservoir, which is a cement rubble masonry wall, was the bottom of the reservoir then. After it was excavated deeper and retaining walls, some four feet thick at the bottom, and taper something like two feet at the top—the bottom was paved with rock laid on end, one of the conditions being that they were not less than a foot up and down and those were hammered in by masons and laid to grade

(Testimony of George Winter.)

—then driven down with a piece of railroad iron. The interstices were then filled up with sand to about three inches of the top, and then after that was done cement grout was swept in with steel brooms until it became flush with the surface of the rock, then a coat of pure cement was spread over the top of that to the thickness of an inch or half an inch, then the bottom was completed and smooth as the bottom of a clean soup plate.

I don't remember the capacity of this reservoir when I took it over and can't estimate it.

The lower reservoir was an irregular excavation in what engineers understand as sidehill work, the upper side in cut and lower side in fill. Where this hole was dug it was a heavy cut in the upper side, but the lower side the stuff taken out of the excavation had to be piled up as an embankment. It was in that state at that time, but lined with a coating of cement just laid over with dirt. There were no retaining walls to it nor [224] no bottom to it like that I have described in the upper reservoir. It was approximately 75 by 150 feet. Its capacity was maybe 400,000 or 500,000 gallons. This is mere guesswork, but it isn't very far from the truth.

At that time and for many years afterwards there was only one pipe leading from the lower reservoir to the city. That one pipe that for many years supplied the city with water was a ten-inch pipe. and left the eastern side of the lower reservoir, the embankment side, and proceeded down the hill in the direction of the Academy, crossing the railroad

(Testimony of George Winter.)

tracks a little south of where the brewery now stands. Later that main was continued out to the Academy and then in various other directions. I put in another pipe when I remodeled the reservoir. It became necessary because the old ten-inch main was no longer sufficient to carry the needs of the city adequately. The capacity of the sum of the openings down town was greater than the opening at the top, at the reservoir, so that that ten-inch main could not supply the city when everyone was sprinkling. To remedy that I put in the other pipe, which connected with an eighteen-inch main, which went to the foot of the hill and is there connected by a Y with two legs, one a twelve-inch and the other a ten-inch. The ten-inch arm goes into the old ten-inch main and the twelve-inch arm proceeds down what is known as the left bank of the Portneuf River until a point where it crosses the river in two eight-inch divisions, one of which passes up Clark Street; another went down along the river on the right bank several blocks and then it turned east, and intersected all the laterals on the streets which it crossed, the idea being that those long laterals that were supplied first from the southern main and were at one time only fed from the upper end, the northern portion of the city had a poor supply compared with the southern portion. As [225] those pipes extended north the numerous taps in them depleted the water, but with two other cross-connections those long lines then running south and north, instead of the mains being fed only at the southern end as at first, are now

(Testimony of George Winter.)

fed at both ends and in the middle. I built a cement rubble wall around the reservoir to increase its capacity as well as its appearance and I think approximately the capacity of it now is something over 600,000. The length and breadth dimensions are not far different from what they were originally, only now they are regular, straight; it is concreted throughout and a retaining wall built around it.

I think the capacity of the upper reservoir is slightly over two million gallons. It is 300 feet long, 100 feet wide. I don't remember the average depth, because the bottom slants so as to enable it to drain, that every drop of water can be drained out of it.

The middle reservoir was constructed four or five or six years ago—I don't remember—entirely under my supervision. Its dimensions are 100 by 200 by 16. There is always about a foot and a half of wall above the top; it can only fill so high and then it overflows. The capacity is over two millions I think.

There are two methods by which water can be taken out of the upper reservoir. One is by the overflow method and the other by pipes which are used for emptying the reservoir, if necessary for cleaning or repairs. We can waste the water away into a creek known as Cusick Creek, if we want to waste it, which we never do except when we are cleaning or there is a natural overflow, more water than the city is using, which is frequent, but the water let out of the upper reservoir by means of the bottom pipes can proceed directly to the lower reservoir, or it can be passed into the middle reservoir

(Testimony of George Winter.)

without [226] going to the lower reservoir, and out of the middle reservoir it can be let out again to the lower reservoir, either at the bottom or at the overflow at the top; just the same as the upper reservoir can be let down into the middle one, so can the middle one be let down into the lower one. There are arrangements in the case of all these reservoirs so that in cleaning them the water can be wasted away instead of being turned into the mains.

The equalizers were put in by my order for this reason: The construction of this plant in its first days was evidently by ignorant men who didn't understand what they were doing, and they bored holes in the mains that might have been all right for a low pressure plant, if we had only 20 or 30 pounds, or something like that, and I suppose in low pressure plants they do that sort of thing, but to a plant with a static head like ours of 115 pounds to the square inch they are an intolerable nuisance, and altogether too large for their purpose. The capacity of the holes they had in them at that time was 80 gallons per minute under that pressure. By making the opening half as much, one-quarter of an inch instead of one-half, I reduced the discharge one-fourth. The present opening, under normal conditions of our head, 115 pounds, will discharge in round figures 20 gallons per minute, according to a table constructed by an eminent hydraulic engineer and acknowledged authority, Mr. Ellis. I made that reduction in the size of the openings because the openings as they were were too large—I reduced them to a size that

(Testimony of George Winter.)

was more appropriate for the purpose for which they were intended.

The water company had no intention of depriving the citizens of Pocatello of a due supply of water in making that reduction. In my opinion 20 gallons a minute is a reasonable service, for all purposes, lawn and domestic uses. It would [227] be 28,800 gallons in 24 hours.

Whenever there have been sprinkling rules here, one of the particular things I took into consideration was the supply that could be obtained from the opening during the time in order to enable me to fix the adequacy of the time. For example, last year we sprinkled in this city for fourteen hours, the rules being different from other rules in two particulars; One was that they had to hold the hose in their hand. This fact alone so prevented the waste of water that they were enabled to sprinkle from six in the morning to eight in the evening.

The reason for the company's adoption of the equalizers is very simple to explain. I will take a two-inch main, with an opening in it of half an inch and will show you what would happen. Taking the half inch as a unit, in the two-inch main there would be four units, that is, four half inches in diameter. The square of four is sixteen and the square of one is one, the meaning of which is that sixteen such openings would exhaust the pipe, that only sixteen people could get water out of it under any pressure at all. When I decreased the size of the opening 64 people could get water out of it, and all good

(Testimony of George Winter.)

service. The main had the same amount of water in it, but they couldn't get as much out of it, they couldn't empty it; it took more people to get the same amount of water, but there was ample supply for them all.

The reducers in the standpipes is an evolution and begun this way, as I remember it. There was a time not very long ago when we had only one sprinkling wagon; that was all that it was thought was necessary at that time. With that one sprinkling wagon, and for many years afterwards when they had two, and an increased number, no trouble of any kind was experienced and the one sprinkling wagon, or two or whatever there were, took water from the water works system *ad libitum*. [228] One day a fire occurred and the fire department made a quick run to the nearest fire hydrant and couldn't open it; it was broken by the sprinkling wagons. The question about the right of the city to take water from the hydrants for sprinkling purposes had at that time never arisen; they had theretofore been privileged to take water from the hydrants. After this first instance occurred, in a friendly consultation with the city council it was concluded that some other way would be better than obtaining water from the fire hydrants for sprinkling carts. The first method that was tried was the putting on to the fire hydrants of what were known at that time as auxiliary valves. That was a brass contrivance that was screwed on to the fire hydrant just where you would screw on a fire hose in case of fire, but it had a valve in it, you

(Testimony of George Winter.)

could shut it off or open it and the fire hydrant was left open all the time, so that this business of continually shutting and opening by unskilled men wouldn't ruin the fire hydrants any more. They were left open all the time, until the department quit sprinkling for the summer or until the cold weather set in, then the hydrants were shut down for the winter to prevent freezing. The hydrant was filled to the top and the street sprinklers got water from this auxiliary valve without tampering with the hydrant at all. That was the first step in the evolution. But other difficulties arose. The auxiliary valves had an erratic habit of blowing off. Sometimes one would blow off in the night and blow across the street and wash out the street or flood a basement. That in itself would have been objection enough, but * * as the number of sprinkling wagons increased there would be more than one filling their wagons at the same time and the effect of a number of large openings like a fire hydrant upon the mains was such that others couldn't get proper service at all. The matter was discussed with the council and by mutual [229] agreement between the council and the company it was determined that standpipes would be tried. I think they were erected by the city and I am sure they were erected at such points as the city thought proper. The number of sprinkling wagons was still increasing and it was found that the use of the standpipes, on account of an abnormally large opening, was little better than the use of the fire hydrants and open to the same ob-

(Testimony of George Winter.)

jections as far as reducing the pressure on the system. Whatever benefit it might be to the sprinkling wagon men, it was certainly a great disadvantage to the other patrons of the company. Something else had to be done. At the bottom of those standpipes is a pipe that connects the standpipe with the main, because none of them are directly upon the main—the water is taken from the main away sideways, to the side of the street, and then the vertical pipe stands, and the valve that supplied them at the bottom. It was attempted to so regulate this valve that the flow would be so reduced that the pressure in the mains would not be so reduced as to damage the service throughout the city. It was tried to turn off the valve partly, instead of leaving them wide open. The result of that was, as might have been expected, there was no uniformity in it. After a test some wagons were filled in four minutes, some took 43 or 45. What we wanted to accomplish and what the city council wanted to accomplish at that time was to get a ten minute service—ten minutes to fill a water wagon. I took up the subject with Mr. Green and we made many experiments. We would try what was called a reducer, but they are really nozzles or chokes. We would try one and it was too large. Anyone who is not a hydrolician will not realize the immense difference that a thirty-second of an inch makes in the size of an opening. We would try a smaller one and after many experiments with carefully [230] calibrated openings made with reamers, with mathematical precision, we finally hit

(Testimony of George Winter.)

upon an opening that by actual test on a barrel would give a ten minute service, and when we had decided upon that they were put in for ten minute service, all but three into three were put openings to give an eight minute service for the reason that they were in the thickly populated business part of the city.

My own impression is that they were put in, not in the night-time, but after sprinkling hours, not because they were put in surreptitiously, but so as not to interfere with the sprinkling wagons—after the sprinkling wagons had quit. Surreptitiously? No. We put these in because we had a right to put them in, and because we were doing the best we could under the circumstances.

Mr. CLARK.—I haven't wanted to object, but I think that this turning the witness loose is—

Mr. RUICK.—I agree with you, Mr. Clark, that that statement is argumentative, and we consent that it be stricken out.

Mr. CLARK.—I suggest that after this you ask the witness questions and allow the witness to answer.

Mr. RUICK.—I have allowed Mr. Winter to explain, as you have done all the way through, the history of this affair.

The COURT.—Proceed.

**[Testimony of George A. Green, for Defendants
(Recalled).]**

GEORGE A. GREEN, recalled, testified as follows, on

Direct Examination by Mr. RUICK.

(Witness identifies an exhibit shown him, a broken casting.)

It is a valve steam nut off a fire hydrant located at what is known as Brady's corner, across from the Bannock Hotel, on Center Street, Pocatello. I removed it from the [231] fire hydrant, took it to the water office and gave it to Mr. Winter. So far as I know it has been in his possession ever since.

(Marked Defendant's Exhibit No. 53.)

There was a fire in what is known as the Hickey building, Center Street and Arthur Avenue, diagonally across from the Bannock Hotel. They tried to open the fire hydrant and couldn't, and reported it as being out of order. I went to see what the trouble was and found that nut broken.

Cross-examination by Mr. CLARK.

This was somewhere in the neighborhood of seven or eight years ago; it might have been longer. I took it to Mr. Winter's office because it was in connection with the water company's business. I don't recollect taking any other one except this one.

[**Testimony of George Winter, for Defendants
(Recalled).**]

GEORGE WINTER, recalled, testified as follows,
on

Direct Examination by Mr. RUICK.

This broken casting identified by Mr. Green has been in my possession for many years. I don't know how long, but since the occasion of the fire Mr. Green spoke of it has been in the window of the water office at my right hand. The fire department found the hydrant out of order and that was reported immediately—they couldn't use it. And in the ordinary course of my duty I investigated to find out what was the matter and this broken casting is the result. That disabled the hydrant.

Mr. RUICK.—We offer this in evidence.

Mr. CLARK.—I think perhaps I shall offer an objection to it as immaterial.

The COURT.—It may be received.

(Defendant's Exhibit No. 53 received in evidence.)

[232]

(Witness resumes:) The city ditch was constructed by the city; I think it was during Mr. Church's administration, when a good deal of stress was laid upon the value to the city of obtaining a water supply from the Fort Hall Ditch. I know that some of the people have used water out of the ditch, and have asked to be excused or have refused to pay for the water from the Pocatello Water Company because they could get water from that ditch. I don't think

(Testimony of George Winter.)

any of them discontinued taking water for domestic purposes but they did for farming and agricultural purposes and gardening and such other truck affairs as they do in this city.

I think that sprinkling rules for 1911 were promulgated early in the month of July, about the 8th. The rules were an attempt to stop unnecessary waste. It was found impossible to enforce them. The condition that I found for making these rules a necessity was that water was being wasted, flowing into the streets, hose were being run without nozzles at all hours of the night and day; sometimes I would see a hose lying in one place for several hours; sometimes I would see one mounted up on something and used as a fountain, running for several hours, the water was doing damage to the lawn instead of good and was wasting into the street to such an extent that if I could not stop it the reservoirs would become depleted. I know of devices being used by parties to muffle the sound of water while they were allowing their hose to run in the night-time; a sack or some other device would be thrown around the outlet of the hose, so as to muffle the sound; it wouldn't be heard like running all night.

My knowledge is it is a customary thing in the hot season for all water companies, whether municipal or private, to make rules governing the use of water.
[233]

Q. Mr. Winter, what was the occasion for the adoption of the rules of 1912, and what effect did it have in conserving the water supply of the city of Pocatello?

(Testimony of George Winter.)

Mr. CLARK.—I object to the statement of the witness:

(Witness resuming:) I am stating what they did, sir. They took the equalizers out of the standpipes, opened the fire plugs at pleasure for other than fire purposes; paid no attention to the rules of the company and the remainder of the water company's patrons followed the example set by the council itself. There was [235] nothing for me to do but to await the results. I couldn't enforce the rules. The reservoirs became depleted; they were emptied in a very short time, then, after the reservoirs were emptied and they couldn't get any more water than the stream that was flowing in, a committee composed partly of the city council and some other citizens called upon me with the request that I would enforce sprinkling rules, and shut off the water, as Mr. Turner put it, or, it was Weidemann, I think. One of my replies to that committee as he said, was, "The place to shut off the water is downtown, at this end. The city council may be able to do it, but, I can't; I am powerless." And Mr. Turner, the present mayor-elect, I think, said upon that occasion that forty policemen couldn't do it. I want to make it clear, if I have not already, that the result of the water company being unable to enforce those rules, either with the city council in its use of the fire hydrants and standpipes or with the remainder of its patrons, was the emptying of the reservoirs, the depletion of the system. Another result of the emptying of the reservoirs was the sucking into

(Testimony of George Winter.)

the mains of silt and sediment, deposits in the bottom of the reservoirs that could not possibly have entered the mains under proper conditions. The next thing was the pure food man,—I think his name is Wallis,—appeared here. He and some other gentlemen, Dr. Hyde, President of the State Board of Health, I think, was with the party, made a visit to the reservoirs unawares to me; I found them there by accident. Dr. Hyde had some bottles along and took what he alleged were samples of the water, and reported to the city council and myself and it was published in the papers, that one of the screens covering the intake pipe was up from the bottom of the reservoir, and that fish as large as your hand could enter the intake. Upon Mr. Hyde's report I went with some other gentlemen, Mr. Church, Mr. Anderson and [236] I think Dr. Hoover, to the reservoir and made an inspection of the screen. The screen is a six-sided figure; there is a bottom in it just the same as there is a top and sides to it. Mr. Hyde had evidently overlooked the fact that there was a bottom to the screen, he thought it was open at the bottom, and that when he put his hand underneath the screen that it was inside of the screen. It was not. The screen was a regular prism, closed on all sides except this end. That is where the pipe went and there it was very closely cemented around the pipe, and is so still. You can not only not get your hand into it, but you couldn't get you finger into it.

The next thing that I remember just now that I

(Testimony of George Winter.)

can recall in order, though I may be overlooking something, is a report of an analysis which Mr. Wallis alleged was made by the State Chemist of the waters, or the samples, rather, that Dr. Hyde had taken on the occasion of a former visit.

At this period the reservoirs are empty and they couldn't be emptied any further. There was an open stream flowing through them, from the upper reservoir down into the middle reservoir, and down into the lower reservoir, and down into the city. As a result of Mr. Wallis' second visit, he ordered me to clean the reservoirs. He said they were filthy and if I would avoid prosecution I would clean them or have them cleaned within a certain time, and that for the purpose of cleaning I might use one-fourth of the water. I knew there was nothing to clean, that the reservoirs were not dirty, but I had to comply, and the only way in which I could take one-quarter of the water,—and that I did sure against my will—was to take it one-quarter of the time. I took all the water one-quarter of the time. When I was using it cleaning the reservoirs it was impossible to use the water for any city purpose at all. We began to clean at six o'clock in the morning. The reason we selected that hour was because in the ordinary [237] course of events, if the water had not been used in the night-time, as it ought not to have been, there would have accumulated quite a supply during the night-time, and then I would be done using the water for cleaning purposes before that accumulated supply would be used up, so as to cause

(Testimony of George Winter.)

the least possible inconvenience. I was supposed to begin at six o'clock but we hardly ever were able to begin so soon, generally it would be seven before we began. At eleven we quit cleaning the reservoirs and for one hour, or as long as it took,—it generally took an hour—the water was allowed to run to waste, until it became clear again. When it became clear and uncontaminated the waste was shut off and it was then turned into the system, after being shut off generally about five hours, though the intention was six.

Things were in that shape when a notice was served upon me, or attempted to be served upon me, which turned out afterwards to be an injunction, I think, signed by Judge Budge, the purpose of which was, I think, ordering me to desist with the cleaning of the reservoirs or interfering with the water supply which I was glad to do.

The notice to the public, as I remember it, was published by Mr. Wallis, in some notice he printed in the newspaper as to what he had agreed that the water company should do, or rather what he had compelled the water company to do.

Q. You recall that there was such notice. Also do you recall that it provided for the shutting off of the water at night between certain hours?

Mr. CLARK.—That is objected to as incompetent and immaterial and not the best evidence.

The COURT.—Sustained, on the ground that it is incompetent.

(Witness resumes:) [238] The cleaning was

(Testimony of George Winter.)

done under the supervision of Mr. George Green. He employed a number of men and they camped up there and set to work as I have stated. I was there nearly all the time, carrying out the orders of Mr. Wallis to the best of my knowledge.

The Gibson Jack pipe-line is the pipe-line that extends from the intake on Gibson Jack Creek to the upper reservoir of the Pocatello Water Company's system. I think it is about 22,000 feet long. At the upper end it is 16 or 17 inches. It is an unusual size because it was the utilization of some redwood continuous stave-pipe that had been used for other purposes and had been taken up when that line was put in, and we used this redwood pipe on the upper end of the system, for several reasons that were sufficient to us; the pipe was good; it was large and saved us from buying other pipe. I think that Mr. Ashton was not aware at the time he testified here that the dimensions were other than what he stated, a foot. The remainder of the pipe is a foot in diameter. The upper end is much larger, for a distance of, I don't think it can possibly be less than 500 feet, and it may be a thousand feet or more.

We take all the waters of Gibson Jack Creek at times. The source of Cusick Creek is from the snows away up what we all know as Kinport's Peak, and all that valley up there is its basin. The Water Company values that creek—

Mr. CLARK.—Just a moment. I object to what the Water Company values the creek for.

(Witness resumes:) It serves the purpose in low

(Testimony of George Winter.)

water of helping out the supply, but the particular purpose that it serves is that at this season of the year, in fact in the months of May say, April, May and June, that creek can be relied upon to furnish the whole of the city with water, and if anything should happen to the line [239] from Gibson Jack, in case of its needing repair, we would select this season of the year to do it, because we are independent of it. Cusick Creek puts us independent of it for those months. In the month of July, as the snow of that shed melts, the flow from that creek diminishes, until there have been years when I knew it to sink into the ground before it reached the water company's reservoir, or intake. Ordinarily, in July and August we can depend upon it for considerable water, perhaps half a cubic foot. It is not generally put into the system except we need it. It is used for irrigating the ground around the reservoir, and is obtained for that purpose at a point away up stream above the intake from that same creek that leads to the reservoir, for the purpose of irrigating. It is taken out of the stream at a point about a half a mile above the intake, and flows down an open ditch to the reservoir, where it is used for irrigating purposes. When we need it it is turned into the system.

At Mink Creek the intake is a cement masonry dam, probably forty or fifty feet long, maybe more, extending across the stream. It is probably within six and nine feet, probably ten feet high, I don't know, with an opening in it for an overflow that I think

(Testimony of George Winter.)

is about twelve feet long and two feet deep, because the flow in that stream is heavy at times in the year. The large opening was made so as to accommodate the overflow at the time of high water. The upper face of the rubble masonry is I think vertical. The sides of the reservoir run away up on the right and left bank of the stream for a considerable distance, maybe 50 feet or more. The bottom of the little reservoir so created is concreted. On the left bank of the stream there is a building which is known as the valve-house and an opening between the little dam and this valve-house. That opening, I suppose is two or three feet square, and allows the water to flow into this little house, which is divided into two [240] compartments. In the compartment furthest from the stream is the entrance to the pipe. In the compartment nearest to the stream, that is always filled with water. The water can't get into the compartment where the end of the pipe is without first flowing through a screen of small mesh. The house is strongly built and a valve can be opened in the compartment nearest the stream and in low water the whole of the stream can be wasted through that valve, if we wanted to clean the reservoir, for instance. The pipe is large, 18 or 24 inches. On the lower side of the dam it is stepped like stairs, only the steps are probably 18 inches or two feet wide. The intention of them is to break the fall of the water as it falls over the crest, and for many feet below the overfall the bed of the creek is paved and concreted.

(Testimony of George Winter.)

The water in the valve-house couldn't get into the intake at all until it had risen to maybe a foot or so below the level of the water in the little reservoir. That is the intention of that little chamber, that it will be kept full of water so as to afford a good entry head for the pipe.

The pipe-line, I think, begins with one length of a 24-inch pipe. A length is usually 12 feet. That is in the cement rubble wall, and was put in, not so much to supply the present line as future uses that might and probably will arise. I may state that the present line from Mink Creek carrying water to Gibson Jack was constructed with this object and purpose in view which I will now state. At low water in Gibson Jack the pipe now extending from Gibson Jack to the upper reservoir was not running full, at low water. The pipe from Gibson Jack to Mink Creek was constructed to carry as much water from Mink Creek at low water as, added to the low water in Gibson Jack, would be up to the full carrying capacity of the pipe-line from Gibson Jack to the upper reservoir. It has amply [241] fulfilled the purpose for which it was constructed. It begins with one length of 24-inch pipe, then the size is reduced to 12 inches by a funnel-shaped affair known as a reducer; the big end of this reducer fits the 24-inch pipe and tapers to the small end which fits the 12-inch pipe. Then the 12-inch pipe extends for maybe a thousand feet, and the size is reduced again to 10 inches. I would rather not state how far without referring to my notes, then it is again reduced to

(Testimony of George Winter.)

eight, and remains at eight until it reaches Mink Creek. It is a riveted steel pipe, with a slip joint, asphaltum coated. In the construction of the Gibson Jack line, the intake is practically the same as the Mink Creek intake, only the pipe is larger.

(Witness identifies paper as copy of company's rules promulgated July 8, 1911 and the same is admitted in evidence and marked Defendant's Exhibit No. 54.)

(Witness identifies paper as copy of company's rules for 1912. Offered in evidence.)

Mr. CLARK.—We object to it as being incompetent and immaterial.

After argument, the contention of counsel for complainant being that conditions in 1912 were not the same as in 1911, the Court ruled:

My impression is, gentlemen, that it is insufficient to prove the fact referred to *be* counsel for the defendant. I think I shall let it go in, however, let the notice go in, and I will consider upon final hearing as to whether or not it is of any value; other facts may be shown that will make it of value.

(Said document was marked Defendant's Exhibit No. 55.) [242]

Q. What effect, if any, did the inauguration of these rules of 1912 have in lessening or increasing the demands for water for lawn sprinkling purposes?

Mr. CLARK.—That is objected to as incompetent and immaterial, and calling for the conclusion of the witness.

The COURT.—The objection is sustained.

(Testimony of George Winter.)

Mr. RUICK.—With the permission of the Court, I will put the question in another form.

The COURT.—Yes.

Q. Was or was not the consumption of water for the irrigation of lawns in 1912 less than in former years, that is, less than in 1911? A. Yes.

[Testimony of Aleck Murray, for Defendants.]

ALECK MURRAY, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination by Mr. RUICK.

I reside in Pocatello and am cashier of the water company. In April, 1911, in company with George Green, I made a census of the patrons of the water company. This shows 851 first lots. We charge the people a dollar for the first lot. 848 lots and trees, additional lots for which we charge \$.50c. 1268 houses; 98 stores; 36 offices; 1097 taps. An actual count was taken by us of the occupants, there were 5072. That includes everyone that is using the Pocatello Water Company's water. We took an average in the case of hotels. 352 baths; 351 water-closets; 2 private fire service; 7 churches; 4 steam boilers; 33 rooming-houses; 9 saloons; 7 urinals; total number of lots occupied 2229.

Cross-examination by Mr. CLARK.

All the citizens on the west side do not take water from our company, a great many have wells and a few have pumps. I don't know how many live on the west side or the east side. We [243] went to

(Testimony of Aleck Murray.)

every house. I don't know that the population at this time is in excess of 10,000. I don't think there is any other water system here except ours. The only parties who could receive water from any other source would be parties who have wells or pumps.

Q. Is it your judgment that four or five thousand people living in town procure water from wells?

Mr. RUICK.—We object to that. That isn't proper cross-examination. Mr. Murray hasn't been asked his opinion on anything at all. He just stated absolute facts. He made a census and that is what he found, and he hasn't expressed any opinion at all. We haven't offered him as an expert, and this question calls for expert knowledge. We simply called him to prove certain facts.

The COURT.—The objection is overruled.

(Witness resumes:) I don't know what the population of the town is or was at that time. We took into consideration the average number of students at the Academy. I wouldn't want to say that there was an excess of single men and women in this town. I have lived here four years; am a nephew of James A. Murray, the defendant. Some of the 33 rooming-houses we found were quite large; we took the average number of rooms. We asked the clerk or Mr. Kasika how many averaged at the Bannock Hotel a night. We took the help if they stayed at the hotel; if they lived at home we got them at their houses. We were nearly three weeks making this census and am prepared to say that that is the correct number of people that were using water from

(Testimony of Aleck Murray.)

the Pocatello Water Company's system in April, 1911. Mr. Breen and I measured off the lots and found approximately 1700, 1699. I think we were charging for 1699 lots. In a case like Bannock County here where they have this block, they were getting a flat rate; [244] we were not charging them for that many lots. They were included.

Redirect Examination by Mr. RUICK.

We were not making a census of the City of Pocatello, where there were no mains we would not go out at all.

(Witness replies to questions of the Court:) These 1268 houses are the only houses to which we furnish water; I haven't any idea how many dwelling-houses there are in the city. I doubt if the population is 9,000; that is the only explanation I can give of where these other people got water. I have never undertaken to make any estimate of the number of wells in town.

[Testimony of George Winter, for Defendants (Recalled).]

GEORGE WINTER, recalled, testified as follows, on

Direct Examination by Mr. RUICK.

At seasons of the year other than the dry season the capacity of the Pocatello Water Company has been so much that I never took any great pains to observe. I would say that it is between four and five cubic feet per second; maybe five second-feet.

(Witness replies to questions of the Court:) To

(Testimony of George Winter.)

the best of my knowledge we could deliver about five cubic feet, five second-feet, if we had that much water. The capacity would be the same the year around.

(Resumes Direct:) The capacity of our works to convey is about five second-feet, or five cubic feet per second of time. Our head works, pipe-line and reservoirs are sufficient for that purpose.

The quantity delivered varies with the season of the year. At this season it is probably around the maximum quantity and there is so much more than enough for our purpose that I never took the pains to determine definitely, but at a season of the year when the water is low and our capacity is taxed, I [245] have taken pains to observe, and the least quantity that I ever knew the company to be delivering to the citizens of Pocatello since the existence of the line from Mink Creek, everything being light and running smoothly, and nothing interfering with us but the supply, was 2,040,000 gallons per day. That means 85,000 gallons per hour; it means 3.14 second-feet.

I have made measurements every dry season for ten years. The time in 1911 that I have taken note of particularly, and I did that because it was the least flow that I have ever observed, was, I think, on the 25th of August. I measured it at the upper reservoir. In round figures the surface area of the upper reservoir is 300 feet by 100 feet, that is, 30,000 square feet. Now, to put one foot of water in that reservoir would mean 30,000 cubic feet. 30,000 cubic

(Testimony of George Winter.)

feet is 225,000 United States gallons of 231 cubic inches each. We for practical purposes arrive at the number of gallons from the number of feet by multiplying the feet by seven and a half. One foot of water put into that reservoir means that 225,000 gallons have been put into it. That is, if I have not made a mistake in my figuring, 85,000 gallons per hour. And at the time I speak of I raised the water in the upper reservoir one foot in 2.64 hours.

I would call that a box test; I think no more satisfactory test could be made. I computed to see what number of gallons per capita that would furnish but haven't those figures here, but I have another calculation that I think I am willing to take for the purpose. While I believe that Mr. Ashton's measurements were somewhat in error—I don't mean to convey the idea that he was incapable but that he had not the opportunities that I had for making a correct measurement—but we have so much water to spare that I will take Mr. Ashton's [246] figures for our purpose, and, assuming for the present that we have only the amount of water that Mr. Ashton found; that is in Gibson Jack, 1.95 second-feet, Mink, .56 and Cusick .05, total 2.56. Now, if we take 2.56, which was the second delivery, and multiply it by 60 we will get 153.6 per minute. If we multiply that by 60 we will get 9216 second-feet of cubic feet per hour. That multiplied by 24 gives 221,184 cubic feet per day. Reducing that to United States gallons by multiplying by $7\frac{1}{2}$ gives 1,658,880 gallons per day, per Mr. Ashton's measure-

(Testimony of George Winter.)

ments. One second-foot means 648,000 gallons per day of 24 hours. Continuing with this calculation on Mr. Ashton's basis that the supply was then 1,658,880 gallons per day, it would mean, according to Mr. Ashton that it would take 3.23 hours to put one foot of water in the upper reservoir, against an actual observation of mine of 2.64 hours, not made upon the same day or checked at that time, which I probably would have done had I known that Mr. Ashton or anyone else was gauging our capacity. 1,658,880 divided by 100 leaves 16,588, the meaning of which is that the quantity of water estimated by Mr. Ashton will supply a population of 16,588 people on a basis of 100 gallons per capita per day. Dividing 16,588, the assumed population that this would supply, by 5,072, the actual population that the water company found by its census it was furnishing water to, we find that would be 327 gallons per capita for our population in the dry season of the year. This is without taking our own measurements at all, which would be more.

I don't know what quantity of water is standard throughout the United States,—I question if anyone knows. I could give you a lot of tables of consumption throughout the cities, but they are not standard. We have authorities which go to show what it is and they say all the way down so low that you [247] might go to 30 gallons per capita, but considering that we are living in the arid region, I wouldn't consider that would be proper for us at all. I disclaim the idea of being an expert. I am manager of the

(Testimony of George Winter.)

water company and a qualified hydraulic engineer and that is all I claim. I figured on a basis of 100 per capita because it was easier to multiply or divide by 100 than anything else. I didn't say 100 was proper. I might have taken ten, that would have been easier still.

As to the amount that would be reasonable in the arid region for domestic and business purposes, I can answer that in two ways, one from my own actual knowledge and the other by engineering authority.

(Reading from book, Water Supply Engineering, Folwell, Article 13, p. 33.)

“Quantity for city and surburban use. In a private *resident* the water furnished is used for drinking, cooking, washing, and other domestic purposes, for watering horses and cattle, washing carriages, and other stable duties, and for sprinkling lawns, flower beds etc. The approximate quantities so used on an American suburban property probably average about as follows: For ordinary indoor use 15 to 25 gallons per capita per day; stable use 50 to 200 gallons for each horse and carriage. For sprinkling lawns in summer and wasted to prevent freezing in winter from 200 to 2000 gallons per house per day during the coldest and driest weather, say four months of the year. * * * For city residences or those having small yards, and where stables are few, a yearly allowance of 20 to 30 gallons per capita per day should be ample for domestic use; one to two gallons per capita for stable use. * * *

(Testimony of George Winter.)

Twenty to forty gallons per capita for office buildings, stores, restaurants, hotels, elevators, [248] factories, etc. For public schools, street sprinkling, sewer flushing, fountains, and extinguishing fires three to five gallons per capita, and for losses three to seven gallons."

Mr. Trautwine, a distinguished engineer, and the author of a text on civil engineering that is recognized all over the United States, and probably all over the world, for a number of years manager of the Philadelphia waterworks and I think secretary of the Society of Civil Engineers, says, under the head of "Water Supply."

"Owing largely to the proper extension of the use of water in dwellings, the quantity required in cities increases faster than the population."

In other words, the per capita consumption increases. The meaning of which, as I understand, is that with modern facilities, baths and sanitary appliances, people now use more water per capita than they used to do in the days when Solomon built palaces without any sanitary accommodations at all. Under the head of "Use," Mr. Trautwine says:

"Abundant experience shows that a supply of 50 gallons, or say seven cubic feet per capita per day is abundant for all the needs and luxuries of well-to-do families in American cities. The manufacturing consumption of course bears no fixed relation to the population. In cities it is generally much less than the domestic consumption."

(Testimony of George Winter.)

Under "Waste":

"In American cities the waste often amounts to two or three times the quantity really used. Of the 116 gallons per capita per day delivered in New York in 1899, Mr. Freeman estimates that from 31 to 56 gallons were used, 10 unavoidably wasted, and from 50 to 75 avoidably wasted. In Philadelphia investigations by means of the [249] Deacon waste detector on 142 modern seven-roomed two story dwellings, with bath, etc., on two intermediate streets, showed that of 222 gallons per capita per day furnished through 782 fixtures, 192 gallons, or 86½ per cent, were wasted, and only 30 gallons, or 13½ per cent, were used. The city is now building enormous works for the purpose of pumping, filtering, conveying, re-pumping, storing and distributing the water wasted, as well as the smaller quantity used."

My own observation on my own premises, which consists of a cottage of five rooms and two lots, with hot and cold water, and closet, sink and what not, 28 trees, lawn and shrubbery, is that in the nonsprinkling months 63 gallons per day were used for the house, not per capita. For the sprinkling months, May, June, July, August, September, an average of 300 gallons per day was used and for July and August 393 gallons per day. A lot is 30 by 140. The per capita per day for the nonsprinkling season is 21 gallons; for the sprinkling season 100 gallons and for July and August, 131. I divided the actual amount of water used by the number in the family,

(Testimony of George Winter.)

three. In a family of five the per capita would be that much lower because the lawns and trees are all the same and it is the lawn and trees that use up water.

It would be easy to deduce some figures on the quantity of water required for lawn purposes from the figures I have given. The per capita for the nonsprinkling season is 21 gallons, for the sprinkling season, 100 gallons. 21 from 100 leaves 79 per capita, not per lot, and for July and August it would leave 111. It would be a great deal higher for a family of five. In my judgment 50 gallons per capita per day is a reasonable amount for lawn and everything.

I made a test of the capacity of the pipe conveying [250] water from Mink Creek into Gibson Jack Creek to ascertain its capacity. I don't remember definitely when this was done but it was shortly after the pipe was laid and put in operation, many years ago. The length of the pipe is 34,000. There is one length of 18-inch pipe, for entrance at intake. If I said different this morning I was in error. There is 1,000 feet of 12-inch pipe, 1,000 feet of 10-inch and 32,000 feet of eight inch, neglecting the reducers. Shortly after it was put in operation I "floated" the pipe, as engineers call it. That means: I bought a lot of permanganate of potash, it was very red, and dyed the creek. At the intake I poured in this red dye, and continued to pour it in for exactly thirty minutes. Then I shut up the door and drove down to the outlet, 34,000 feet. In exactly four

(Testimony of George Winter.)

hours and twenty-eight minutes the red dye that I put in at the upper end began to pass out at the lower end and in thirty minutes, as near as may be, the water ran clean again, the meaning of which is that the pipe was filled with water when I put this in at the upper end and all the water that was in when I began this test had emptied itself before that red material began to come through. The capacity of the pipe is 12,502 cubic feet, from which I deduce the following facts: The average velocity was 2.11 feet per second; the quantity discharged was .78 cubic feet per second; that means 5.85 gallons per second; that means 67,392 cubic feet per day; that means 505,440 gallons per day. At Mr. Turner's own figures, at that time a population of 5,000 persons, would give 100 gallons per capita per day to over 5,000 persons, that pipe alone. Mr. Ashton's estimate was .56; mine is .78.

The line is crooked. In the gulches are what is known as mud valves to blow off the mud and on the high places air valves, as air accumulates in the highest point in the pipe and would stop the flow if not permitted to escape. They are not [251] automatic,—have to be opened and shut. I learned some days after Mr. Ashton made that measurement that some of the valves were open. If they were all open, or a great deal less than the whole, no water would come through the pipe at all.

I have a meter at my premises and have at different times solicited the privilege of installing meters in the city.

(Testimony of George Winter.)

Defendant's Exhibit 1 is signed, I believe, by D. Worth Clark, who had previous authority from me, as manager of the water company, to write such a letter.

(Letter read into record.)

Defendant's Exhibit No. 1 [Letter, Dated October 3, 1907, D. Worth Clark to Fire and Water Committee and City Council of City of Pocatello, Idaho.]

“Oct, 3, 1907.

To the Fire and Water Committee and the City Council of the City of Pocatello, Idaho.

Gentlemen:—

In the matter of the contemplated settlement of the differences between the Water Company and the City Council, in order to arrive at an amicable adjustment of this matter it seems that it will be necessary for the Council to pass an ordinance giving the Water Company the right to put in meters whenever they may deem it advisable, the water rates for such service to be fixed at such amounts as may hereafter be determined to be just. It is not the desire of the Water Company, as I understand it, to meter the city, but simply to have the right to meter it whenever it may be deemed advisable. The reason for this is that the Water Company experiences a great deal of trouble every year in trying to prevent ten or fifteen per cent of its customers from wasting water, while the remaining eighty or ninety per cent give no trouble, but in order to get the ten

(Testimony of George Winter.)

or fifteen per cent to discontinue the waste of water, it is necessary for the Water Company to make rules [252] which work hardship upon all. To avoid making these rules, and to reach this ten or fifteen per cent the Water Company wishes to be able to place meters at its discretion as the easiest way of solving the difficulty. If this concession can be made by the City Council, I believe a satisfactory adjustment of the other matters in question can be made, and of course if an adjustment is made, that necessarily involves a dismissal of the suit now pending against the city.

As your committee was not prepared when they last met, to give me a definite answer upon the question of meters, I thought it proper that this question be presented to the Council so that an idea of their disposition thereon might be determined before the other questions are taken up for adjustment, as this is, in my judgment, the most important question at issue, and as I said before, no doubt the other questions can be adjusted if this question meets with favorable consideration at your hands.

Yours very truly,

D. WORTH CLARK."

(Witness resumes:) My remembrance is that negotiations were pending at that time. The company has never secured from the city permission to install meters, although I have tried it many times. Off and on since 1907. Mr. Murray at one time authorized me to state to the city council, and I did, and made a public letter, that if the city would grant

(Testimony of George Winter.)

him a reasonable meter ordinance, or the right to charge reasonable meter rates, he would agree to bring in water sufficient for a city of 50,000 population. I think that is the last effort the water company made. I think it was a later attempt than any of those rejected or proposed ordinances.

Mr. CLARK.—I move to strike that out. I supposed the witness was referring to some letter that had been introduced [253] in evidence, and I didn't object to it when I should have, but I move to strike out the answer of the witness to the letter that Mr. Murray sent to the city council, as to what it contained.

Mr. RUICK.—We will produce it later if we can and try to identify it.

The COURT.—The motion is allowed.

(Witness resumes:) I remember the resolution referred to as the Bistline resolution. I have no remembrance of any meeting and if I was present and a resolution like that was passed by the council I would certainly remember it. I was not, to my knowledge, present at any meeting at which minutes containing such resolution were read. No notice was ever served upon the water company, Mr. Murray or myself, to my knowledge, of such a resolution. No notice in writing was ever given to the company, to my knowledge; I am positive I never got any notice in writing. I really can't say whether or not I saw an account of this resolution in the newspapers.

(Testimony of George Winter.)

Cross-examination by Mr. CLARK.

I did not say that after these contrivances had been introduced into the service pipes 80 gallons per minute would pass through with a static head of 115 pounds. I read from a table, the theoretical discharge under our pressure, 115 static pressure, for a quarter inch opening is 20 gallons per minute, but the actual discharge would be less. I never testified that 20 gallons per minute would pass through this small contrivance here; I don't know what size that thing is. Assuming the diameter to be a quarter of an inch the actual discharge, according to the table, would be about 64 per cent of the theoretical. I know the users of water in the service pipes in Pocatello have not been able to procure 20 gallons per minute during the [254] summer months when they have been irrigating their lawns. They have long pipes of small bore, half an inch, and while I have no doubt if this opening was put in the main and the water allowed to spout out freely it would just give such results as are tabulated here, but when it is conveyed through a long distance, through a small pipe, the loss by friction is so enormous that it would be impossible to say what water they would get without making a test. The reason you have a good pressure when no one else is irrigating and not so good when others are irrigating, is every opening in the main reduces the pressure. If the main were open at one end altogether there would be no pressure to speak of in it, if it were running free. If you shut it up at one end and leave

(Testimony of George Winter.)

one opening that will make a fine pressure, and when you make more that will reduce the pressure. You can make so many openings that it will almost equal the capacity of the pipe, when the pressure will be practically nil.

I was here in 1901. Gibson Jack Creek for low-water season runs approximately two and one-half second-feet. I testified that .78 of a cubic foot would be sufficient to supply over 5,000 people and give each of them 100 gallons per capita per day. I believe it would be sufficient to irrigate the lawns and take care of all the consumption of the people here, but I did not so testify. We were bringing in the waters of Gibson Jack Creek in 1901. Whether we had enough then to supply 20,000 people would depend altogether on how much they used. Under proper conditions, perhaps, yes. At the time Ordinance No. 86 was passed—I would have to make a calculation to answer, I think you are right, but I am not sure about it. I think the water in Mink Creek is somewhat like Mr. Ashton testified, about $3\frac{3}{5}$ cubic feet per second. At the time our Mink Creek line was constructed we brought in .78 of [255] a foot per second. I don't think I have made any measurements of the amount delivered by that pipe since. There has been no additional water brought in from Mink Creek since 1905, the date of Complainant's Exhibit No. 11.

I think the system had been in operation 12 or 13 years before these reducers were put in. I think they were put in the entire system that was con-

(Testimony of George Winter.)

structed at the time. I am not sure, but think it was nine years ago. I don't remember whether reducers were put in the standpipes before they were put in the private service pipes or after. We made a test to give a ten minute service when we put the reducers in, using the normal pressure at that time. It would be pretty hard to state what was the normal pressure in the summer season; sometimes in 1911 there wasn't any. I don't think we made the test when the pressure was very low; I think it was serviceable pressure,—I don't know now what number of pounds. In order to determine how much water would run through this reducer in a given length of time, it would be absolutely necessary to know what pressure was upon the pipe. I can't remember what the pressure was; I only remember it would do what I was trying to get, give a ten minute service with the pressure I gave it.

I think these reducers remained in the standpipes until the present administration tore them out. I testified that I couldn't enforce the rules because the city had set the example of paying no attention to them; one thing was taking the reducers out of the standpipes and using the fire hydrants.

Q. To get water to sprinkle their streets?

Mr. RUICK.—We object to that as a conclusion. In the form in which it is put it is a conclusion.

The COURT.—Overruled,—that is, the present form of it,—simply to get water to sprinkle the streets.

(Testimony of George Winter.)

(Witness resumes:) [256] To fill sprinkling wagons. I don't think I ever said I desired the right to meter the city for the purpose of preventing ten or fifteen per cent of the inhabitants from wasting water; I authorized you to write that letter but I didn't dictate the language. I don't remember writing you a letter using that language, I think my conversations with you were generally personal. I prepared some rules in 1911 to the effect that when people wasted water it should be optional with the water company to install a water meter for the purpose of measuring all water delivered to such person or persons; my attorney made that rule,—I think it was Mr. Terrell; he didn't advise me that I had a right to make such a rule or to meter the service where water was being wasted. We discussed the question and I remember him pointing out to me that there were difficulties in the way. We prepared the rules with the object of enforcing them if we could. I never put in a meter anywhere. I abandoned the idea of enforcing the rules after the action of the city council. I attempted to enforce the rules; I went around myself and served out notices in several places. I have put in meters with the consent of the people and have even been asked to put them in by people who didn't want to be bothered by perplexing rules and were willing to pay for the water. I never attempted to force anyone to put in any meter.

(Witness replies to questions of the Court:) One reason why I didn't stop the waste by putting in the

(Testimony of George Winter.)

meters is very important. I was advised that without the consent of the city council the water company might spend a very large sum of money in putting in instruments that would be declared perhaps illegal, that we had no right to put in, and before Mr. Murray would invest the amount of money that would be necessary to meter this city we wanted to know whether he would or would not be upheld by the city council, or whether [257] objection would be taken to it. When we find that water is being wasted, we shut off the water. There has been one serious obstacle in the way of putting in meters where we found that people were dishonest. Referring to the 1911 rule there, the great difficulty in it is this, that under the charter under which we were operating we had no right as far as I knew, to meter the service, and the question would arise, how much was enough water for a man's purposes. It had not been determined on a flat rate. He was entitled to water on a flat rate. Now, you will find, if your Honor please, that the rates put in here are for excess above the reasonable amount, and the question is always open, what is a reasonable amount. There is the question that I never felt that it would be settled satisfactorily if the water company put in meters, what is this reasonable amount they should receive under the general charge fixed by the ordinance.

(Witness replies to Mr. Clark:) My remembrance is that some time in July, and shortly after the issuance of these rules, the reservoirs were drained.

(Testimony of George Winter.)

We tried to stop the waste of water. Mr. Green and I served these notices, copy of the rules, and called people's attention to them. I couldn't help the reservoirs getting empty. I knew they were being drained and I was powerless to prevent it.

They have been increasing the sprinkling wagons from year to year, I don't remember when the increase took place. I think there are seven now and were in 1911. I have enforced the rules with increasing difficulty from year to year. I don't remember whether I shut off the water for several weeks in 1910 at night or not. I believe there were sprinkling rules in 1910; I had lots of trouble. I don't remember that they were very stringent rules. There were several people fined. I think the fines were given to a hospital, or some charitable [258] institution so it would not be laid to the charge of the water company that they were fining people for the money. I think some of the citizens were co-operating with us. Those that were fined didn't co-operate with me. My object was to keep the reservoirs full so that the town might have some fire protection. I remember appearing in the council when the adjuster was here; I don't know whether it was in 1910 or not. I think Mr. Bistline was on that council and that he was not co-operating with me. I think we had a disagreeable exchange of views at that very meeting. I think Bistling was insisting that I bring in the waters of Mink Creek. I think that every member of the council, with the exception of Bistline, were satisfied to abide by the contract

(Testimony of George Winter.)

No. 86 between the city and the company, and were also satisfied with the result of Judge De Haven's decision in the Federal court. I think I could account for the resolution that if I didn't bring in the waters of Mink Creek within six months the contract would be forfeited but I don't know it of my own knowledge. Some demands were made upon me during the Loux administration; I don't remember now what they were. I don't remember the date when Mr. Wallis was here first. I don't think he gave any order the first time he came down. I am sure he published the notice the second time. I cleaned the reservoirs immediately after Mr. Wallis gave me the orders. The only result of cleaning out the reservoirs was that the city was out of water for certain period while I was using it. I never got through with the cleaning, I was disagreeably interrupted.

I said at times Mink Creek sinks before it reaches the reservoir. Gibson Jack Creek during low water always runs approximately 21½ second-feet. All the waters of Gibson Jack Creek I think were being brought in prior to the passage of Ordinance No. 86, and carried through this pipe. I think we [259] supply more people now from our system than we did in 1901. The town has increased immensely.

I don't think the reservoirs were full when the rules were issued in 1911. As a usual thing, the reservoir would be very low in the evening if sprinkling hours were open. If in the morning the reser-

(Testimony of George Winter.)

voir was full again there was no necessity for rules, but if there came a time when the reservoirs would not have during the night, gained up what they lost during the previous day, and then continued to lose more the next day, it would be only a matter of a short time until it would become dry, then I issued rules, probably first warnings, asking people to be careful not to waste water, then when that wouldn't have the effect, rules and tried to enforce them.

My feeling on bringing in the waters of Mink Creek and I think Mr. Murray's was that if they passed a meter ordinance and demonstrated that they needed more water, which I don't believe they do, but the people themselves would be the judges, if there was not enough water to satisfy them by meter why then we would bring in the remainder, or anything else that we could. I think I know the letter you mean where Mr. Murray says the council are asking him to make an investment of \$150,000.

Mr. RUICK.—I understood, your Honor, that all this evidence here is just merely for the purpose of showing that negotiations were on between the parties; I so understood that it was limited to that.

Mr. CLARK.—That shows the facts that it contains.

Mr. RUICK.—The fact that Mr. Murray made a proposition; that was all there was to it, wasn't it? Is that a legitimate basis for cross-examination? Are they going to go over each document that they themselves introduced, on cross-examination?

(Testimony of George Winter.)

The COURT.—As I understand the purpose, this is cross-examination upon the witness' statement that they were furnishing plenty of water here, and this relates to the conditions upon which the proposition was made to furnish an additional amount of water. It seems to be the contention of the city here, as I infer from some of the cross-examination, that the defendant here has resorted to certain measurements and done certain things because angered by the attitude of the city council in declining to be governed by Ordinance No. 86, so far as it relates to the manner in which the rates shall be fixed. I assume that it relates to that subject.

Mr. CLARK.—Yes, your Honor.

The COURT.—You may proceed.

(Witness resumes:) I am not quite clear now what improvements were covered by this proposal to expend \$150,000. I think it was to cover something that the city wanted done.

Q. Do you know what improvements were contemplated by Mr. Murray for which he was to expend \$150,000 in the event that these negotiations were consummated?

A. Judging from the date of this letter, and other matters, I think it was in relation to certain demands that were made upon Mr. Murray by the then city council.

Q. Among which was to bring in the waters of Mink Creek?

A. I don't particularly remember what those demands were; I think maybe that was one of them; I

(Testimony of George Winter.)

think very likely it was.

The COURT.—You don't know what was referred to by the \$150,000 of your own knowledge?

A. I believe, sir, it was demands that were made upon Mr. Murray. [261]

The COURT.—But you don't know of your own knowledge whether it was the Mink Creek water or not?

A. No, sir, I think it related to that, but I am not sure.

The COURT.—Well, the answer will be stricken out then. If the witness doesn't know, of course it wouldn't be fair to the defendant to have him indulge in speculation about it.

(Witness resumes:) I think the ordinance I desired to have passed was laid on the table.

I think the statement, "per capita consumption is the amount of water used per day for each person living in the city supplied, on the basis of the average annual figures," is a correct statement of the fact if you mean the average annual per capita consumption. The figures I gave for my house, 21 gallons, was minimum use. The dry hot months would be one of the times of maximum use, the other time would be in the winter when to prevent freezing the water was permitted to run.

On a basis of 100 gallons per capita, the irrigated area and the population of Pocatello may be increased three times, and our plant is of sufficient capacity to furnish water for that irrigated area and that population.

(Testimony of George Winter.)

(Witness identifies documents which are marked Complainant's Exhibit No. 18 and Complainant's Exhibit No. 18a, on cross-examination, and read into the record as follows:)

"In the matter of meters:—the Water Company experiences much trouble every year in trying to prevent some 10 or 15% of its customers from wasting water, while the remaining 85 or 90% give no trouble; but in order to reach the 10 or 15% who waste, it becomes necessary for the water company to make rules which work a hardship upon [262] all. It is to reach this 10 or 15% that the water company wishes to be able to place meters at its discretion, as the easiest way of solving the difficulty.

With regard to the matter of street sprinkling, I believe a satisfactory adjustment can be made, but until the broad question of meters is disposed of there is no use in considering details.

Yours truly,

GEO. WINTER."

"1. The Water Company will agree to bring all the waters of Mink and Gibson Jack Creeks, at low water, into the City of Pocatello for the use and benefit of its people.

2. The Water Company shall have the right to meter the service of any consumer, at its discretion. The meter rate may be a debatable subject, but the right to place meters will not be debatable. No meter rater, however, shall be less than the flat rate now in existence and these rates shall continue in

(Testimony of George Winter.)

force during the remainder of the life of the charter. If the meter situation be satisfactorily adjusted then the subject of street sprinkling may be taken up. If the matter of placing meters cannot be adjusted satisfactorily, there will be no use in continuing the negotiations."

(Witness resumes:) I don't know whether the city council presented this ordinance to me or not. Mr. Terrell may have presented one to me, I can't say that he did, but I don't remember. What occurs to me in that connection, and that stood in the way of negotiations at that time, was this, that I think, if I remember right, that the Water Company was afraid that any ordinance subsequent to Ordinance No. 86, under which the Water Company was then operating, would cancel clauses in that ordinance which the Water Company thought material. My judgment in the [263] matter is this, and no more, that negotiations along the lines of that ordinance were discussed, but with what results or what real steps were taken in the matter at that time I have no remembrance.

(Document offered and marked Complainant's Exhibit No. 19; admitted upon Mr. Clark's statement that the ordinance had been delivered to him by Mr. Winter, as purporting to come from the city council.)

(Witness resumes:) I can't find any rules of the company prior to 1911. I am not clear that we had them every year after 1905. I think there were seasons when we didn't have any rules, but when

(Testimony of George Winter.)

sprinkling became so that the reservoirs were being depleted we published rules. Rules of 1910 were published in the Pocatello "Tribune."

(Copies of the Pocatello "Tribune" of June 14th, 1910, August 9, 1910, and July 22, 1910, offered in evidence and marked Complainant's Exhibits Nos. 20, 21 and 22.)

(Counsel for defendants offers in evidence Exhibits "A," "B," "C," "D," "E" and "F." Admitted over objection as to materiality.)

[Testimony of A. R. Teeple, for Defendants.]

A. R. TEEPLE, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination by Mr. RUICK.

I came to Pocatello a year ago last February; am Assistant Observer in charge of the Weather Bureau here and as such am custodian of the records showing the annual rainfall for Pocatello.

The annual rainfall for 1902 was 11.44 inches; 1903, 10.79; 1904, 12.53; 1905, 10.20; 1906, 18.17; 1907, 17.43; 1908, 15.07; 1909, 22.43; 1910, 9.50; 1911, 18.48; 1912, 17.46.

Cross-examination by Mr. CLARK.

The rainfall for the month of July, beginning with 1902 [264] and ending with 1912, is as follows: .34, .41, .49, .85, .59, .36, .29, .81, .10, .47, one inch and 63 hundredths.

For August, 1902, .17, .59, .66, .35, 1.25, 1.65, 1.08, 3.07, .11, .01, 1.19.

September, 1902, .21, .42, .47, .76, .48, .45, .94, 2.47, .36, .60, .92.

The record shows the day in the month when this rain fell as follows:

July, 1902: 1st, .02; 2d, .09; 3d, .08; 4th, .13; 8th, trace; that is less than a hundredth of an inch. 12th, .01; 29th, trace; 30th, .01.

1904: 3d, .01; 4th, .06; 5th, .06; 7th, .01; 8th, trace; 12th, .03; 13th, .08; 20th, 21st and 23d, trace; 26th, .23; 28th, .01.

1905: 1st, .01; 2d, .02; 14th, .06; 15th, trace; 20th, .03; 24th, .03; 25th and 26th, trace; 30th, .70; 31st, trace.

1906: 2d, trace; 8th, .58; 9th, .01; 13th, trace; 31st, trace.

1907: 2d, trace; 3d, .01; 4th, .05; 11th, trace; 14th, .14; 15th, .08; 20th, .02; 26th, .03; 24th, .03; 29th, trace.

1908: 11th and 13th, trace; 14th, .02; 15th, .23; 22d, trace; 23d, .01; 26th, trace; 27th, .03; 28th, trace.

1909: 2d, .10; 3d, .14; 5th, trace; 11th, trace; 19th, .21; 20th, .02; 26th, .27; 27th, .07.

1910: 1st, 3d and 4th, trace; 12th, .01; 14th, .05; 17th, trace; 20th, .02; 26th, trace; 28th, trace; 31st, .02.

1911: 6th, .42; 17th, .01; 18th, .01; 20th, .01; 25th, trace; 26th, .02.

1912: 2d, trace; 4th, .02; 6th, trace; 12th, trace; 13th, .09; 18th, trace; 19th, .02; 20th, trace; 21st, .01; 26th, trace; 29th, .28; 30th, .44; 31st, .77.

(Testimony of A. R. Teeple.)

The COURT.—Gentlemen, do you care to have read into the [265] record a mere trace? I want to ask the witness first—in calculating the total amount of rainfall for a month do you consider trace?

WITNESS.—No, sir, it is less than .01 of an inch; it is not a measurable amount.

The COURT.—If you think it material it may go in.

Mr. CLARK.—Well, I don't care for it.

(Witness resumes:)

August.

1902. 12th, .13; 14th, .01; 27th, .03;

1903. 14th, .02; 19th, .02; 21st, .54; 26th, .01.

1904. 11th, .38; 16th, .01; 23d, .06; 27th, .12; 28th, .03; 29th, .06.

1905. 3d, .09; 4th, .06; 13th, .02; 22d, .15; 25th, .03.

1906. 2d, .12; 3d, .29; 11th, .04; 12th, .11; 18th, .18; 19th, .01; 21st, .20; 22d, .25; 23d, .05.

1907. 1st, .01; 2d, .04; 3d, .85; 24th, .29; 25th, .18; 26th, .06; 27th, .15; 28th, .06; 30th, .01.

1908. 5th, .32; 13th, .21; 14th, .03; 18th, .01; 19th, .01; 21st, .13; 22d, .18; 30th, .19.

1909. 1st, .08; 9th, .04; 11th, .36; 12th, .03; 13th, .02; 22d, .40; 23d, .42; 30th, .82; 31st, .90.

1910. 10th, .10; 11th, .01.

1911. 5th, .01.

1912. 1st, .40; 14th, .03; 15th, .12; 16th, .09; 17th, .30; 26th, .19; 27th, .06.

(Testimony of A. R. Teeple.)

September.

1902. 25th, .03; 26th, .01; 28th, .17;
 1903. 7th, .03; 11th, .11; 12th, .08; 13th, .09; 30th,
 11;
 1904. 22d, .01; 26th, .28; 27th, .18;
 1905. 24th, .03; 25th, .13; 28th, .15; 29th, .45.
 1906. 7th, .15; 13th, .30; 15th, .03.
 1907. 4th, .05; 5th, .03; 25th, .03; 26th, .27; 29th, .07;
 1908. 11th, .05; 12th, .01; 16th, .19; 17th, .69; [266]
 1909. 1st, .76; 2d, .33; 5th, .57; 7th, .20; 10th, .06;
 11th, .07; 12th, .01; 26th, .01; 28th, .45; 29th,
 .01;
 1910. 4th, .02; 13th, .02; 14th, .03; 15th, .06; 16th,
 .05; 17th, .15; 18th, .03;
 1911. 3d, .05; 5th, .06; 6th, .01; 12th, .14; 13th, .18;
 22d, .15; 30th, .01;
 1912. 1st, .07; 3d, .09; 4th, .02; 9th, .34; 10th, .07;
 13th, .14; 23d, .19.

Redirect Examination by Mr. RUICK.

The total rainfall for January, 1911, was four inches and 28 hundredths. That was both rain and melting snow. February, one inch and 50 hundredths. March, one inch and 12 hundredths. April, one inch and 58 hundredths. May, one inch and 62 hundredths. June, three inches and 13 hundredths. This refers to precipitation, both rain and snow.

January, 1912, one inch and 49 hundredths. February, nine-two hundredths. March, one inch and 13 hundredths. April, two inches and 20 hundredths. May, one inch and 59 hundredths. June, one inch and ninety-nine hundredths.

[Testimony of W. E. Moore, for Defendants.]

W. E. MOORE, a witness duly called and sworn on behalf of defendants, testified as follows, on

Direct Examination by Mr. HAWLEY.

I reside in Spokane and am engaged in the hydraulic engineering business. I graduated from Pennsylvania State College in 1890 and have made civil engineering my business since. Was engaged in various kinds of engineering up to 1899; since then I have been in the hydraulic practice exclusively practically all the time. For about ten years I was with the Lewiston-Clarkston Company, in Asotin County, Washington, and had charge of all their engineering work, did all their construction work and had charge of the distribution of water for irrigation and domestic purposes both. This company covers an area of about seven or eight thousand acres in [267] irrigation and supplies the town of Clarkston with domestic water supply. Clarkston has about 3,500 people and is situate just across Snake River from Lewiston. It is in an arid section. I have been engaged in consulting practice in Spokane about five years. Among other things I have been called in by the City of Spokane in consultation regarding their water system, their future development of their power schemes, and so on. I have had an extended experience and necessarily had to give time and attention to investigations with reference to the amount of water needed per capita in cities and towns. In the town of Clarkston:—

(Testimony of W. E. Moore.)

Mr. CLARK.—I object to the witness answering a general question by specific instances. I think that calls for a general conclusion; I don't think the witness should give his specific instances.

Mr. HAWLEY.—I think, your Honor, that it would be proper in order to answer this question, for the witness to give his experience. I have asked for his experience—based upon his observation and reading—his experience in these lines. Necessarily that would involve that he must speak from personal experience too to a very great extent, and in speaking from personal experience it would necessarily follow also that he must mention the places where he had been operating.

The COURT.—No, we can't try out the Clarkston case here. He may, as an expert, state a general conclusion which he has reached as a result of his reading and experience and observation. If opposing counsel want to go into these matters they may do so upon cross-examination. The objection is sustained.

Q. You may state from your experience, observation and reading upon the subject, how much water is required per capita for the use [268] of the population of a city or town—well, I will ask you, generally, for all purposes.

Mr. CLARK.—That is objected to as incompetent and immaterial.

The COURT.—Overruled. He may answer.

(Witness resumes:) My observation has been that where the consumers have been on a meter basis

(Testimony of W. E. Moore.)

they get along very comfortably on from five to eight thousand gallons per month per family of an average of about five people, that from five to eight thousand gallons per month serves for all the water used on the premises. That does not include water for fire purposes and for street sprinkling. The amount needed for those purposes varies considerably, but on general principles, in my estimation, it runs from ten to fifteen gallons per day per capita, for all street sprinkling and fire protection.

In my first answer I included the sprinkling of lawns, everything that the water was used for on the premises. I did not include the amount that would be used in manufacturing establishments. Usually the increase of population increases the demand for water, largely for manufacturing. I have never made any attempt to segregate the amount of water required for lawns and gardens from the domestic supply. 3.14 cubic feet on a basis of 10,000 population would be about 203 gallons per day per capita. That would be considerably more than double the amount necessary. On a basis of 2.56, I have a calculation made here. I have deducted 220,000 gallons per day, being 4,000 gallons per day for each of 55 fire hydrants. That leaves a balance of approximately 143 gallons per day, based on a population of 10,000 people. A population of 5,072 gives 282 gallons per capita per day. There is no question but what it is excessive. I haven't any hesitation in saying that, exclusive of the city's use, an allowance of from 55 to 65 gallons per capita is sufficient for Poca-

(Testimony of W. E. Moore.)

tello. This is based on the experience I have [269] had with water systems.

Ascertaining the amount of water contained or carried in a certain pipe by floating permanganate of potash in the pipe, observing the time it was placed in, putting it in for a definite time and observing the length of time at the outlet when the evidences of it disappeared, is about as accurate a method as you can get.

There is no more accurate method of ascertaining the dimensions of an intake than by filling a reservoir of given capacity with the water flowing from it.

Cross-examination by Mr. CLARK.

In making my estimate I used $7\frac{1}{2}$ instead of 7.48 and figured for a 24 hour period. Assuming that there was 2.22 second-feet, that would give approximately 142. After deducting the amount used by the city, 220,000 gallons, it would be approximately 127 gallons per capita per day. The estimate I gave as to the per capita amount necessary was 55 to 65 gallons, the maximum amount at any time of the year. For a city of 5,000 water users that would be a little less than half a second-foot. That would be sufficient to supply all the water users of the Pocattello Water Company for all purposes exclusive of the city's demands. From the recollections that I have of the records made of that, the water consumed in the winter time has usually not exceeded about 25% of the maximum demand in the summer time. That would reduce the average consumption to 20 or

(Testimony of W. E. Moore.)

30 gallons per capita during the entire year.

Witness replies to questions of the Court:

I have never represented the consumers of water in a professional capacity. The roots of any crop that does not root deeply requires more water than crops that grow deeper. If the surface can be cultivated and is cultivated, it helps to conserve the moisture in the ground. I have had experience in handling [270] water for the production of crops. I think it requires a little more water to keep blue grass in good condition for a lawn where you sprinkle it daily than it would in farming operations, where you cultivate the land. I have irrigated a lawn and kept it in good condition with twice the water necessary for crops. That was in Clarkston. During five years my water bill never exceeded the maximum allowed, of 5,000 gallons a month, in maintaining a lawn, and all domestic purposes, supply. The soil there is very similar to this, the subsoil is not quite the same, I think. I should think an average of about two acre feet would be necessary to irrigate farm lands in this vicinity. I think a second-foot flow for 100 acres of ground is ample, unless there is some peculiarity of the soil, for general farming. It requires less for orchards if they are properly taken care of.

Redirect Examination by Mr. HAWLEY.

The average rainfall in Clarkston is about ten inches. During the five years I was on a meter basis in Clarkston I never exceeded the minimum allow-

(Testimony of W. E. Moore.)

ance of 5,000 gallons a month for all purposes used on the premises. From my best recollection not over 10 or 15% of the water users on a meter basis exceeded that amount. The water plant in Spokane is owned by the municipality.

Recross-examination by Mr. CLARK.

I was the engineer of the water company, and also had charge of the distribution of the water. It was taken from Asotin Creek. The minimum flow of this creek during any measurements I ever took of it was about forty second-feet. The irrigation system is a closed system, piped throughout. We made no attempt to segregate the domestic supply from the irrigation supply. Incidentally, along the line of the irrigation system they develop power. By shutting off the water from the power plant they had approximately forty second-feet available for daily purposes, if they wanted to use it. We did not have a main to be used particularly for the [271] city supply; the service pipes were attached direct to the general system. We have mains all over the flat. The supply main is used for all purposes, for the town of Clarkston and for the irrigation of about 7,000 acres.

(Witness replies to questions of the Court:) We have a 48-inch main that takes water from the creek, that comes down and supplies both the town and irrigated land; we have no sub-main that is used exclusively for supplying the town. Several distributaries reach the town but none of them are segregated for domestic use and a customer can attach

(Testimony of W. E. Moore.)

to any of them, whether he is in town or three miles out.

I have been through Pocatello several times but never stopped off for any considerable period. I have made observations in Blackfoot, Custer, Twin Falls country; those in Twin Falls and the Boise-Payette country were rather cursory examinations. They were for the purpose of obtaining knowledge as to the amount per acre required to irrigate farming land. In the Blackfoot country they were using about a second foot for 80 acres, some were using more, the old contracts all called for more than that. I don't think it was necessary. I think on general principles about a second-foot per hundred acres is a fair amount of water for general farming purposes and I think under the general condition of the soil there it would be sufficient for Blackfoot.

Redirect Examination by Mr. HAWLEY.

We have a meter system in Clarkston.

[Testimony of G. A. Elliott, for Defendants.]

G. A. ELLIOTT, a witness duly called and sworn on behalf of the defendants, testified as follows, on

Direct Examination by Mr. HAWLEY.

I reside in San Francisco; am a hydraulic engineer; at present superintendent of the Spring Valley Water Company and have been for four years. It is the only company supplying water in San Francisco. It supplies the city to the extent at the present time [272] of about 41,000,000 gallons a day.

(Testimony of G. A. Elliott.)

I graduated in 1904 from the University of Colorado, civil engineering department. Practically all my experience in water supply for cities has been in the last four years, and in connection with that I have had to look up the water supply and the probable per capita supply of other cities, because part of my work was to design a system to take care of San Francisco when it should be fully built up, and in that connection I have had to investigate a number of coast supplies. The object of the investigation was the amount of water per capita and the amount for city purposes. I made personal investigation of Los Angeles, Oakland, Alameda, Berkeley and obtained some information from the northern part of the coast by letter. I don't think you would call those regions arid although we have six months without rain. I also examined Portland, Oregon. I read up the consumption, probable consumption, of cities all over the world. I was engaged in this kind of investigating something like eight months.

I took this position as head of the water company in San Francisco five years after I graduated. Immediately after leaving college I was engaged with the General Electric Company in Schenectady, in electrical work. I then went to California and was field engineer for the Pacific Gas & Electric Company, on power work, hydraulic power installations, ditches, and so on. I was afterwards with the Great Western Power Company in the same capacity, and afterwards with the Spring Valley Water Company.

I should say that fifty gallons of water is ample

(Testimony of G. A. Elliott.)

for the inhabitants of the city, an average throughout the year of fifty gallons. I consider myself competent to speak with regard to the matter. I have found that it varies anywhere from 10 to 15% more than the average in the summer, and about 10% less in the winter time. The amount of water needed increases with the population, per capita, due to the increased uses that greater population [273] brings about. In making this estimate I was estimating a city of considerable population, where those increased uses were in vogue. The principle increased use is manufacturing; there is probably a greater use for irrigation in public parks, and also probably a greater fire use, also a little greater for flushing sewers in larger cities.

In a city of 10,000 where there were no manufactures conducted, 40 gallons per capita would be ample, exclusive of irrigation. I have had experience in California. I would not call Oakland and that vicinity in the semi-arid belt; we have rain fall for about six months and it is dry for about six months, but of course it is on the coast. It is necessary to use water artificially in order to have lawns grow. My observation there at the time I was making these investigations showed that ten gallons per capita per day in the summer time, that is, for that six months, that is, five gallons per capita all the year, was used for lawn sprinkling.

In making investigations I also took into consideration the use of water by railroads. The amount would be less if the railroads had their own water.

(Testimony of G. A. Elliott.)

The amount delivered into the city of Los Angeles is 135 gallons per capita per day. About 60 gallons of that is lost either through leaky mains or leaky house-pipes. I would not be positive about the lawns but this includes the water supplied for all other purposes. Irrigation is necessary to keep the lawns up; I think the dry season extends to a longer period than it does in San Francisco. Assuming that this city had a water supply of 3.14 second-feet, at the lowest stage in 1911, and also had a population of 10,000, between 203 and 204 gallons per capita would be supplied the inhabitants. Assuming that 5,072 of the inhabitants only used the water, it would practically double it, make it 406. Assuming that the water supply instead of being 3.14 was 2.56 that would be [274] 165 approximately per capita for 10,000 people, and if there were only 5,072 people it would be approximately 325 gallons. Assuming that there were 55 hydrants each using 4,000 gallons for city and sprinkling purposes, or 220,000, it would leave 143 gallons per capita for 10,000 people. If there were only 5,072 water users, it would be approximately 281 gallons per capita. That supply in my judgment would be an excess of four times what would be necessary, on an average, and an excess of three times what was required in the lawn sprinkling time. I am familiar with methods of measuring water. If the water supply was 2.22 the amount per capita for 10,000 would be approximately 144. For 5,072 approximately 283.

I estimated in the matter of lawns here, 103 acres.

(Testimony of G. A. Elliott.)

I figured on the basis of one second-foot for eighty acres, and took into consideration the amount of 4,000 gallons used by each of the 55 hydrants; figuring on irrigating 103 acres it leaves 820,000 gallons per day over, based on a supply of 2.56 second-feet, and that amounts, including the hydrants allowance, to over 82 gallons per capita per day, or excluding the hydrants allowance, 60. That 60 gallons would simply be for domestic use in the interior of the house, drinking, cooking and toilet uses.

Five-eighths of an inch of water, continuous flow, so far as acre-feet are concerned, running for five months, will cover the ground about three and three-quarters feet.

I am familiar with the methods of measuring water in reservoirs and determining the amount in pipes. The most accurate measurement of water for any purpose is volumetric, taking the volume of the water in cubic feet. If the shape of the reservoir is accurately known, the most accurate method I know of is permitting the water to run into a reservoir for a certain definite time and then ascertaining from the amount that has so run the flow [275] of that water in second-feet. In my judgment the method of putting permanganate of potash in at the intake of the pipe for a certain number of minutes, and then ascertaining at the outlet the length of time before the evidence of the potash would disappear, would be an extremely accurate way of doing it, because in all pipe measurements it is necessary first to ascertain the velocity of the water in the pipe, and all

(Testimony of G. A. Elliott.)

instruments made for that purpose are subject to more or less variation, while this method I should say was subject to absolutely no variation. The only other way as accurate as that would be by running it into a measured box for a given time.

Cross-examination by Mr. CLARK.

I came here as a witness on receipt of a telegram from the Pocatello Water Company. I didn't know who the company was or who composed it.

I said an average of 50 gallons a year is ample anywhere; I didn't specify San Francisco. It uses about 45 gallons per capita per day. 83 gallons per capita per day is being delivered to the city; our measurements show that the rest is wasted. I don't know how much is used in Salt Lake City, Denver or Pueblo. In San Jose there is delivered about 114 gallons per capita per day. My recollection may not be absolutely accurate on that. We are not making any arrangements to increase the supply for San Francisco. There is an attempt on the part of the citizens to increase the water supply. The present amount is sufficient, but they don't consider it is sufficient for future needs. We are delivering 41,000,000 gallons this present year. The 1912 delivery was between 39 and 40; at present we are delivering about 41. We are delivering all we have developed. We are capable of developing 210,000,000. We have about 89 per capita per day available in the main pipes leading to the city. Plans have been on foot for fifteen years and are continually agitated to bring in the Hetch-Hetchy [276] supply,

(Testimony of G. A. Elliott.)

which would considerably more than double the present supply. This is not designed for San Francisco, alone, the cities across the bay have a population equivalent to San Francisco and they intend to use it also. I don't know how much is available per capita for Oakland. I don't know that Oakland, Berkeley and other towns are agitated about getting more water. The agitation about the Hetch-Hetchy supply was started by the city engineer in San Francisco in order to have greater backing in getting his permit. I believe Los Angeles' increased supply will be in the city in about a month now. The aqueduct has been completed. The present supply is about 45,000,000 gallons per day, or 135 per capita. They did not have more than twice as much water as they needed at the time this new aqueduct and works was built, for the reason that they were an unmetered town, and were using about 350 gallons per day per capita until the installation of meters. They put in meters and also went to the expense of spending about \$22,000,000, to bring in this increased supply, which, I understand, is about 240,000,000 gallons daily. That is about 720 gallons a day for the present population. To the best of my recollection, the per capita consumption in Portland in 1911 was between 90 and 100. I got that from correspondence with the city engineer. I do not know what the per capita consumption in Chicago was in 1911. I understand it is somewhere in the neighborhood of 203 gallons as given in the American Civil Engineer's Pocket Book. Of course you know there is

(Testimony of G. A. Elliott.)

over 50% lost in the slip of the pump. I am not familiar with the per capita consumption in Philadelphia. I didn't say I had investigated every city, I had read up about it, and based my judgment on what I found on the coast and personal investigation. The trouble with these per capita consumptions that are published is that they take no account of the misuse of water; in other words of the loss, either in the water system, due to [277] leaks, or the loss due to house leaks, and sometimes, as in the case of Chicago, they estimate the quantity of water from the strokes of the pump, and the pumps usually have what is known as slippage. In other words, they don't deliver their rated capacity. I have found the waste to be in San Francisco, from misuse, either through loss in the company's system, or the people's system, to be about one-half of the total amount delivered. I don't mean by waste, the water used for irrigation, but through leaky fixtures, or leaks in the joints of the pipes underground. There is an enormous waste in all water works. We inspect and meter for waste, and try to reduce it through those methods. If we lose half of the water in the system we have to have water somewhere to supply for that waste.

The per capita consumption in other cities I can give from my reading as I recall it. I have a definite recollection of Little Falls, New York, 40 gallons per capita per day on that. New York, to the best of my recollection, an unmetered town, has 135. The city of Buffalo has over 200. I don't know

(Testimony of G. A. Elliott.)

about Denver, Salt Lake City or Boise. I don't know any city through this section. I got reports from 700 or 800 cities and I don't remember all of them.

(Rules of 1905 were here offered in evidence as part of Mr. Winter's cross-examination and marked Complainant's Exhibit No. 23.)

(Witness resumes:) At the present time the additional water supply in Los Angeles is for both city use and irrigation. They will use what they need in the city and the rest of the supply will be used to irrigate the San Fernando valley, the idea being that the city will grow out in that direction and that the irrigation use made of the water will just about cover the town use in the future, if the town spreads into that irrigated country. [278]

"Waste" includes misuse by the consumers, everything but actual necessary use. Eliminating waste, which should be done in every town, and making what I consider a liberal allowance for lawns, it would seem to me that at the very outset 80 gallons per capita per day should cover all uses, and I make that statement having in mind that there is at the present time, as I understand it, a right for the city to use 220,000 gallons a day for hydrant purposes, and I know from actual experience that the use of that amount of water is practically impossible for fires and street sprinkling. Five gallons a day would be ample for that use.

Cross-examination by Mr. CLARK.

In water supplied for cities it is always custom-

(Testimony of G. A. Elliott.)

ary to take into consideration the future growth of the city. In Los Angeles the water supply is being secured for the present and future needs of the city and is just temporarily diverted for irrigation purposes. I don't know that half of the supply is lost in the mains at Pocatello; that was my experience with my own company, not in the mains, in leaks. The waste that an individual user might make in applying the water might be even greater.

Redirect Examination by Mr. HAWLEY.

There is no limit to the growth of Los Angeles. The water supply is about 240 miles from the city. The future demand of the city would justify the construction of such a system in part, also the fact that there is a certain economical size which you would build in any sort of construction work. In other words, to state an extreme case, if you need ten million gallons more you wouldn't run 240 miles of pipe just to carry 210 million gallons. You would construct a system that would have some permanency and would eventually pay for itself and not become obsolete.

Recross-examination by Mr. CLARK.

It wouldn't be good judgment to estimate the capacity of a water system on the actual population of the city at the time [279] it was constructed.

Redirect Examination by Mr. HAWLEY.

You would expect to have an available future supply to take care of future growth. You might not

(Testimony of Theodore Turner.)

develop it at that time, but you would have it capable of being developed.

Defendant rests.

**[Testimony of Theodore Turner, for Plaintiff
(Recalled in Rebuttal).]**

THEODORE TURNER, upon being recalled by the plaintiff in rebuttal, testified as follows, on

Direct Examination by Mr. CLARK.

(Witness identifies a photograph, Defendant's Exhibit No. 21.)

That shows a part of South Seventh Avenue. This little corner here is some vacant lots belonging to Mrs. Olmstead, and these lots with the trees on to Mr. Bean and Green, the hardware men, Water for the irrigation of those trees during the summer of 1911 was taken, part of it from the Pocatello Water Company and the latter part of the season from the city's ditch. I know this pretty well because the waste water from these lots here that came out of the city ditch used to come down here and run in front of my place and would mire me when I would try to get away from home.

(Witness identifies photograph, Defendant's Exhibit No. 23.)

That is on South Seventh Avenue also; part of Professor Slaughter's place and the rear of Judge Budge's place. Water for the irrigation of those trees and lawns and garden during the latter part of the season of 1911 was procured from the city ditch. We built a little system of our own out there

(Testimony of Theodore Turner.)

to supplement the supply we were getting from the Pocatello Water Company. We built it so we could fill the sprinklers and supplement the [280] irrigation of our trees and gardens.

(Witness identifies photograph, Defendant's Exhibit No. 19.)

It is Mr. George Winter's home. I have lived here twenty years. Of course I lived in Boise part of that time and down on the farm part of that time but this has always been my home. There has been some waste of water in Pocatello; there always is in irrigating, but a great many of the people tried to irrigate without waste. I have always tried to be economical, however, and use what water was necessary without waste. There has been a small percentage of waste of water. There has not been the usual waste that is usually had where you irrigate from open ditches, but there has been some little waste of water. There has not been a very great amount except such as naturally flows from conditions such as exist in Pocatello.

Cross-examination by Mr. RUICK.

I am not an active member of the Commercial Club; I pay dues to them. I don't think I ever read the booklet through which they got out. I had nothing to do with the authorship of it.

**[Testimony of Samuel G. Garbett, for Plaintiff
(in Rebuttal.)**

SAMUEL G. GARBETT, a witness duly called and sworn on behalf of the plaintiff, in rebuttal, testified as follows, on

Direct Examination by Mr. CLARK.

(Witness identifies photograph, Defendant's Exhibit No. 26.)

This is William Kelley's place. I couldn't tell where he got all his water but he got some from a well he has. He has a windmill. He had a gasoline engine there for about a year. But when I used to come from work he had a three or four inch pipe that he used to run the water from the well, from the windmill, down in the back part where the garden is. He has got trees in one-half and the garden at the other part; he has a whole block there.

(Witness identifies photograph, Defendant's Exhibit No. 21.) [281]

In September, 1911, that water there came from an overflow from the east side of the town. My place is the lowest place over there and all the water that would flow down would lay right in there. Sometimes the ditch used to break out up here on the east of Pocatello there.

(Witness replies to questions of Mr. Ruick:) I lived right there at that particular time, saw the water and notified the chief of police about it

Mr. RUICK.—I object to it as incompetent, immaterial and irrelevant.

(Testimony of Samuel G. Garbett.)

Mr. CLARK.—I think he has a right to state that.

Mr. RUICK.—No, not at all. He stated that he saw the water there, and he is not entitled to give his reasons.

Mr. CLARK.—I will submit it to the court.

The COURT.—He may go on.

(Witness resumes:) That is where it came from. I notified the chief of police about the water lying there, because it gets stagnant.

(Witness identifies photograph, Defendant's Exhibit No. 42.)

That is on Seventh Avenue, two blocks north of my place, Lombardy's. I couldn't tell you where all the water came from but he got some of it from a hand pump that stands back of the house. He dug a well in the ground.

Cross-examination by Mr. RUICK.

I don't know anything about the capacity of his windmill. The pump throws a pretty good stream; he has about an inch hose on there.

[Testimony of Eugene A. Potter, for Plaintiff (in Rebuttal).]

EUGENE A. POTTER, a witness duly called and sworn on behalf of the plaintiff in rebuttal, testified as follows, on

Direct Examination by Mr. CLARK.

I am a druggist, live in Pocatello. Defendant's Exhibit [282] No. 47 is a photograph of my garden. It shows the lower half. The upper half was in corn and beans and stuff of that kind. You can

(Testimony of Eugene A. Potter.)

see it dead here for want of water, I kept the other part alive by irrigating from the city hose. I have four lots there, and I had to neglect my lawn and just keep the water around the trees and on this garden.

**[Testimony of Walter H. Cleare, for Plaintiff
(Recalled in Rebuttal).]**

WALTER H. CLEARE, a witness heretofore duly called and sworn on behalf of the plaintiff, upon being recalled in rebuttal, testified as follows, on

Direct Examination by Mr. CLARK.

Judging of waste of water by seeing it overflow from the lawns that are being watered, I recall very few places that there was any waste. I do not know of any general conditions of waste of water in Pocatello; I think it is the exception rather than the rule. To the Clerk of the Above-named Court:

The foregoing constitutes defendant's statement of the evidence to be included in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered in said cause.

You are further notified that, pursuant to notice this day given, the solicitors for defendant will, on the 25th day of October, 1913, at 10 o'clock A. M., ask the Judge of said court to approve the said statement.

N. M. RUICK,
JAS. H. HAWLEY,
Solicitors for Defendant. [283]

Complainant's Exhibit No. 3 [Minutes of Meeting of City Council of City of Pocatello, Dated October 15, 1907].

SPECIAL EXECUTIVE Session of the City Council of the City of Pocatello, held at the office of the Mayor, in the City of Pocatello, Idaho, at 8 o'clock P. M. on this the 15th day of October 1907.

All members of the council were notified of said meeting and invited to be present:

Present: C. E. M. Loux, Mayor, E. G. Houde, C. C. Chilson, T. O. Martin, T. C. Smith, J. M. Bistline and Thos. E. Terrell:

Absent: John Fusz and J. J. Williams:

The meeting was called to order by the mayor, who stated the object of the meeting to be the consideration and discussion of the water question.

The subject was discussed in its different phases, and after full consideration, the following resolution was submitted by E. G. Houde, to wit:

Be it resolved that it is to the best interest of the people of the city of Pocatello, and the Pocatello Water Company, owned by James A. Murray, that all differences and disputes between them be settled and adjusted amicably; and for that purpose,

Be it further resolved, that it is the sense of the undersigned councilmen that it is to the best interests of the City of Pocatello, its inhabitants and the Pocatello Water Company, that an ordinance be passed by the city council, approved by the mayor and published in due form, permitting the said Pocatello Water Company to install, at its expense, meters or other

standard device to measure all water service for public and private uses in the City of Pocatello, at just and reasonable rates, upon the following conditions, to wit:

1st. That the said Pocatello Water Company, its successors or assigns shall and will provide and install pipes or other appropriate means and appliances that will divert and carry [284] all of the waters flowing in Gibson Jack Creek and Mink Creek, above their present points of diversion, in low water season, into the City of Pocatello for public and private uses, within one year from and after the date of the passage, approval and publication of said ordinance.

2d. That the said Pocatello Water Company will, within thirty days from and after the passage and approval of said ordinance, connect its pipes and mains on the west side of the Portneuf River, with the pipes and mains on the east side of said river, in the City of Pocatello, as now contemplated by said company:

3rd. That the said Pocatello Water Company, its successors and assigns, will at all times make such extensions of its service pipes and mains along the streets and avenues of said city, so as to give water service to any locality within said city where the revenue to be derived from the proposed users along such extension, shall yield sufficient to pay a reasonable amount of interest on the money necessary to make such extensions:

4th. That the said Pocatello Water Company, its successors and assigns will at all times, furnish and

provide at its own expense, and at reasonable places, adequate and sufficient appliances for delivering water to the city of Pocatello, for fire, sprinkling and other public purposes:

5th. That the said Pocatello Water Company, upon the passage and approval of said ordinance, immediately cause the suit now pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, against the City of Pocatello, and others, enjoining said city and others from the use of fire hydrants in taking water for sprinkling purposes, to be dismissed at its expense; and in the meantime will stay all further proceedings and extend time to answer therein until five days after the next regular meeting of the City Council: [285]

And provided further, that said ordinance shall not go into effect until the first day of July, 1908, and then only upon the condition that the said Pocatello Water Company, its successors or assigns, shall have commenced work in good faith for the bringing in of the said waters of Mink Creek and Gibson Jack Creek, as heretofore provided; and shall have complied with all other conditions as above named.

And be it further resolved, that at the next regular meeting of the City Council, if this settlement be accepted, that a warrant be ordered drawn in favor of the Pocatello Water Company, for the amount due it for water service up to the current month.

And be it further resolved, that we respectfully request a reply on or before the 17th day of October,

1907, which is the next regular meeting of the City Council, accepting or rejecting the propositions herein made.

Said resolution was adopted by the unanimous vote of all members of the city council present, who then and there subscribed their names hereto.

This the 15th day of October, 1907.

.....

Mayor.

.....

.....

.....

.....

.....

[Endorsed]: Complainant's Exhibit No. 3. Filed April 26, 1913. A. L. Richardson, Clerk." [286]

Complainant's Exhibit No. 4 [Letter Dated October 17, 1907, Pocatello Water Co. to Mayor and City Council of Pocatello, Idaho].

Pocatello, Idaho, October 17, 1907.

To the Honorable Mayor and City Council of Pocatello, Idaho.

Gentlemen:—

Referring to a copy of resolutions passed by the Council at a Special Executive Session held on the 15th October, 1907, and which was handed to me by Alderman Terrell yesterday,—I would respectfully refer you to my letter to the City Council dated August 30, 1907, in which I referred you to D. Worth Clark, Esq., who had kindly consented to act for the Water Company on the subject matter of your Res-

olutions of the 15th inst., and also to my letter to the City Council of Oct. 11, 1907, in which I quoted Rule 23 and advised you that in accordance with which the Water Company would, as soon as may be, proceed to shut off the water from the Fire Hydrants and Standpipes within the city until the overdue bills for water supplied during the months of July, August and September were paid. In reference to the wishes of a member of the City Council, I stayed final action until the Council could have another meeting, which it did on the 15th inst. as aforesaid. Lest I should appear hasty, or that the City Council has failed to apprehend the true meaning of my communications, I shall still stay final action until after your meetings this evening.

While I have no criticism to offer upon the Resolutions, the subjects therein treated, with the exception of the bill, have been referred to Mr. Clark for adjustment and it would be, to say the least, discourteous to that gentleman to pass upon a matter myself which I had submitted to him. Moreover, the bill is a separate matter under a contract now in effect and must be paid for services rendered in the past and not for promises in the future. [287]

In conclusion, I will say again that there is perhaps nothing objectionable in the resolutions except that the Water Company is asked to agree to expend so large an amount of money without proper time for consideration.

I sincerely trust that your Honorable Body will realize that this letter makes for the peaceful adjustment of all relations between the City Council and the Water Co.; that the matters referred to Mr.

Clark and set forth in your Resolutions, can be settled after full discussion, within a reasonable time and without hurt, either to the City Council or to the Water Company.

Yours respectfully,
POCATELLO WATER CO.,
By GEO. WINTER, Supt.

[Endorsed]: "Complainant's Exhibit No. 4. Filed April 26, 1913. A. L. Richardson, Clerk. [288]"

Complainant's Exhibit No. 5 [Ordinance of City of Pocatello, Dated — Day of November, 1907].

ORDINANCE NO.—.

An Ordinance Granting and Authorizing James A. Murray, his Successors, Personal Representatives and Assigns the Right, Privilege and Permission to Use, Install and Maintain at His or Their Expense, Meters to Measure all Water Service, Public and Private, Within the City of Pocatello, Upon Certain Conditions.

Be it ordained by the Mayor and the City Council of the City of Pocatello:

Section 1. The right, privilege and permission is hereby granted and conferred upon James A. Murray, his successors, personal representatives and assigns, to install and maintain, at his or their expense, meters to measure all water service, public or private, within the City of Pocatello, Idaho, at reasonable rates, and without distinction of persons.

Section 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 3. This ordinance shall take effect and be

in full force from and after the first day of July, 1908, after its due passage, approval and publication as required by law; Provided, that the said James A. Murray, his successors, personal representatives or assigns, shall have commenced work for the bringing into the City of Pocatello all the waters flowing and to flow in Mink Creek and Gibson Jack Creek, in low water season, before said date; and provided, that the said James A. Murray, shall have dismissed the suit now pending in the District Court of the Fifth Judicial District of the State of Idaho, wherein the said James A. Murray is plaintiff and the City of Pocatello, the Mayor, City Councilmen and George Gittins, are defendants, enjoining the use of fire hydrants for delivering water for sprinkling purposes, before said date; and provided, that the said James A. Murray, his successors, personal [289] representatives or assigns shall have made or caused to be made the connection between the water pipes and mains lying on the west side of Portneuf River, with the water pipes and mains on the east side of said River, before said date; and provided further, that the said James A. Murray, his successors, personal representatives or assigns, shall always furnish and provide at his or their expense, and at reasonable places, adequate and sufficient appliances for delivering water to the City of Pocatello for fire, sprinkling and other public purposes, and will, at all times, make extensions of his or their service pipes and mains along streets and avenues within said city, so as to provide water service to any locality within the said city where the revenue to be derived from pro-

posed water users along such extensions shall yield sufficient to pay a reasonable interest on the money necessary to make such extensions; otherwise, this ordinance shall be void and of no force or effect.

Passed and approved on this the — day of November, 1907.

Approved:

.....,

Mayor.

Attest:,

City Clerk.

[Endorsed]: "Complainant's Exhibit No. 5. A. L. Richardson, Clerk." [290]

Complainant's Exhibit No. 6 [Letter, Dated June 10, 1908, George Winter to Mayor and City Council of Pocatello, Idaho].

No. 147.

Filed April 26, 1913. A. L. Richardson, Clerk.

OFFICE OF THE POCATELLO WATER
COMPANY.

JAMES A. MURRAY, GEORGE WINTER,
Prest. Supt.

"To satisfy the desolate and waste ground;
and to cause the bud of the tender herb to
spring forth."—Job xxxviii: 27.

Pocatello, Idaho, June 10, 1908.

To the Mayor and City Council,

Pocatello, Idaho.

Gentlemen:—

I am directed by James A. Murray to deliver to you that attached amended proposals from Mr. Mur-

ray to increase and extend the water supply of Pocatello and to amicably adjust all differences between the City Council and the Water Company. Mr. Murray further directs me to say that this proposal is amended so as to grant all of the concessions promised in his letter to the City Council dated Hunter's Hot Springs, Montana, 31st May, 1908, and read at the last regular meeting of the Council on Friday evening, the 5th inst.

Respectfully submitted,

GEO. WINTER, Supt.,
POCATELLO WATER CO.

Lost. [291]

Complainant's Exhibit No. 6½ [Ordinance of City Council of Pocatello, Idaho, Granting Franchise to James A. Murray, etc.].

183.

No. 147.

Filed April 26, 1913. A. L. Richardson, Clerk.

An ordinance granting a franchise to James A. Murray to construct, own and operate a Water Plant or System in the City of Pocatello, Idaho, and granting to said James A. Murray a right of way over, along and across the streets and alleys of said City for the laying of water pipes and mains, and making a contract by the City of Pocatello, Bannock County, Idaho, with James A. Murray for supplying said City, and the inhabitants thereof, with water for public and private use, for extending the present water system and plant now operated in said City, by James A. Murray, and used for the purpose of

supplying said City, and the inhabitants thereof, with water for public and private use, fixing the rates to be charged for said water, fixing the present valuation of said water plant, providing a plan for ascertaining the value of said water plant in the future as a basis of readjusting rates, or as a basis of valuation in the event of the sale of said plant, and waiving the right on the part of said City to build or acquire a competitive water system except under stated conditions, or of granting to others more favorable terms or franchises than the terms and franchises now held and hereby granted to said James A. Murray by this ordinance.

PREAMBLE.

Whereas the then town or village of Pocatello on the 4th day of January, 1892, by an ordinance duly passed and authorized granted to F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right, authority and permission to construct, maintain, and operate an entire and complete water system of water mains, pipes and conduits for the purpose of [292] furnishing and supplying said town or village of Pocatello, and the inhabitants thereof, with a sufficiency of pure and healthy water, and annexing certain precedent to said grant.

And whereas, the said F. D. Toms, John J. Cusick and James A. Murray and their associates, successors and assigns fully complied with said conditions precedent, and obtained vested rights under said grant.

And whereas, the City of Pocatello is a city of

the second class and is the legal municipal successor of said village of Pocatello.

And whereas, a commission duly appointed and constituted did on or about the first day of September, 1886, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, the then owner and holder of said privileges and franchises for both public and private uses, which said rates were confirmed and continued by the provisions of Ordinance No. 56, approved June 8, A. D. 1898.

And whereas said James A. Murray thereafter succeeded to, and became, and is now the owner and holder of all the property of whatever kind and nature formerly owned or held by said Pocatello Water Company, including the said water system or plant complete, and all rights, privileges and franchises appurtenant thereto, or used therewith.

And whereas, the City of Pocatello on the 6th day of June, 1901, by Ordinance No. 86, ratified, continued and confirmed unto James A. Murray, and to his successors and assigns, according to the terms of said original grant and ordinance, the privileges and franchises originally granted, given and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns as recited in Pocatello town or village. Ordinance No. 46, passed and approved January 4, 1892, the said James A. Murray at that time being the legal successor of said F. [293] D. Toms, John J. Cusick and James A. Murray therein named.

And whereas, the said James A. Murray is now

the owner and holder of said water system or plant complete, and all rights, privileges and franchises appurtenant thereto, or used therewith, and all rights, privileges and franchises granted by said Ordinance No. 86, passed on the 6th day of June, 1901, and also all rights, privileges and franchises granted to said F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns as recited in Pocatello town or village Ordinance No. 46, passed and approved January 4, 1892.

And whereas, disputes have arisen between the City of Pocatello and said James A. Murray as to the construction to be placed upon said ordinance, the said City of Pocatello has complained, and is now complaining on account of the amount of water said James A. Murray is able to furnish to said City, and its inhabitants, in accordance with said ordinances, contracts and franchises.

And whereas, the City of Pocatello now claims that the present supply of water furnished by said water system is inadequate for the present and future needs of said City, and is threatening to commence suit against said James A. Murray on account of such inadequate supply, and is threatening to attempt to declare forfeited the franchises heretofore granted.

And whereas, it is the desire both of said City of Pocatello and said James A. Murray that all differences and disputes between them be settled and adjusted amicably, and without resort to the courts, and finally.

And whereas, it is necessary in order to make such amicable adjustment for James A. Murray to replace the present pipe-line by a larger pipe to bring in the surplus waters of Mink Creek owned by said Murray at the present time, and to make extensions of street mains in said City, thereby necessitating the laying of several miles of pipe at an additional expenditure of a large sum [294] of money. And whereas, said James A. Murray before incurring so great an additional expense, and before agreeing to the bringing in of said additional waters, as a condition precedent to the expense of laying said pipe, desires to be protected against unreasonable or arbitrary charges in the rates for water and water service, and also desires to have a present valuation placed upon the water plant as now existing as a basis for fixing rates and charges for water service in the future, and also as a basis of valuation for sale under the terms of this ordinance in the future, and asks some assurance that unreasonable or arbitrary changes shall not be made, and asks that a present valuation be placed upon said plant as a basis for future changes, if any that may be made in said water rates or charges, and as a basis for the valuation of said plant in the event of sale, or taking over of the same by said City in the future, under the terms and provisions of this ordinance.

And whereas, the demand of said James A. Murray in said respect is considered reasonable and just, and it is deemed to be for the best interest of the City of Pocatello to extend and give the assur-

ance asked for, and to enter into this contract with said James A. Murray.

Now, therefore, be it ordained by the Mayor and City Council of the City of Pocatello, Idaho:

Section 1. That there is hereby given, conferred and granted unto James A. Murray, his successors, personal representatives and assigns, the right, authority, privilege and permission to construct, maintain and operate as now constructed or as may hereafter be desired by said James A. Murray, an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the City of Pocatello, Idaho, for the purpose of laying along, over and under said streets, alleys and public highways, water mains, pipes and conduits for the [295] purpose of furnishing and supplying said City of Pocatello, and the inhabitants thereof, with a sufficiency of pure and healthful water.

Section 2: That all the rights, privileges and franchises, and all property owned and acquired by said James A. Murray under and by virtue of Pocatello town or village Ordinance No. 46 passed and approved January 4, 1892, or under Ordinance No. 86 of the City of Pocatello, passed and approved June 6, 1901, and hereby ratified, continued and confirmed unto James A. Murray and to his successors and assigns.

Section 3: The grant of privileges mentioned and contained in this ordinance unto the said James A. Murray, his successors, personal representatives and

assigns, shall be continued and exist for a period of fifty (50) years from and after the passage and approval of this ordinance.

Section 4: The right, privilege and permission is hereby granted and conferred upon James A. Murray, his successors, personal representatives and assigns to install meters to measure all water service, public or private within the City of Pocatello, Idaho, said meters to be installed and maintained at the expense of said James A. Murray, his successors, personal representatives and assigns.

Section 5: The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the said James A. Murray to the City of Pocatello, and the inhabitants thereof, shall hereafter be as hereinafter stated, to wit:

SCHEDULE OF METER RATES.

Water for the use of the inhabitants of said City of Pocatello: [296]

100 to	500	gallons per day	50¢	per thousand	gallons.		
500	"	1500	"	"	40¢	"	"
1500	"	3000	"	"	35¢	"	"
3000	"	5000	"	"	30¢	"	"
5000	"	10000	"	"	25¢	"	"
10000	"	20000	"	"	20¢	"	"

But in no case shall the minimum monthly charge for water delivered by meter measure be less than the following schedule of water rates, which said rates are hereby fixed as the minimum monthly charge for all water delivered to the inhabitants of the City of Pocatello, by meter measurement, to wit:

	Per Month
Bakery, for each baker.....	\$ 2.00
Bannock County (all water used in court and jail).....	10.00
Barber-shop.....	1.00
Each additional chair.....	.25
Bath, public, first tub.....	1.50
Each additional tub.....	.75
Beer-house.....	\$2.00 to 3.50..
Billiard saloon with bar.....	\$2.00 to 3.50
Blacksmith-shop, per forge.....	.50
Bookbindery, per hand.....	.50
Bookbindery, Minimum.....	1.50
Brickyard, per gang.....	2.50
Brickwork (per thousand).....	.12½
Butcher-shop.....	2.00
Butcher-shop, with steam boiler.....	4.50
Candy factory.....	2.00
Carriage-shop, each hand.....	.50
Carriage-shop, minimum.....	2.00
Church.....	1.50
Cigar Factory, per hand.....	.25
[297] Cigar Factory, minimum.....	2.00
Clubrooms and Halls.....	1.50
Coffee Saloon.....	2.00
Confectionery.....	2.00
Cow.....	.25
Drug Store.....	2.00
Dyeing or Scouring Works.....	3.00
Fire-plugs, for fire only (private).....	.50
Fountain, ¼ inch jet.....	6.00
Horse, mule or cow.....	.25

[298]

Per Month.

Hose for private stable.....	.50
Hotel or boarding-house, per room.....	.25
Hot-water heating plant.....	\$2.00 to .5.00
Hotel or boarding-house, minimum.....	3.50
House or private residence.....	1.50
Each bath in private residence.....	.50
Each water-closet.....	.25
Laundry.....	\$5.00 to 30.00
Lawn sprinkling, first lot.....	1.00
Each additional lot.....	.50
Liquor store.....	\$2.00 to 2.50
Livery-stable, first stall.....	.40
Each additional stall.....	.25
Livery-stable, per vehicle.....	.20
Minimum for livery-stable.....	2.50
Office, doctor, lawyer, etc.....	1.00
Each additional occupant.....	.25
Oyster saloon, each table, four to six persons	.50
Oyster saloon, minimum.....	2.00
Photograph gallery.....	3.00
Plastering per yard.....	. $\frac{3}{4}$
Concrete per cu. foot.....	.01
Printing office, per hand.....	.50
Printing-office, minimum.....	1.50
Restaurant, each table of six persons.....	.50
Restaurant, minimum.....	3.00
School, each pupil.....	.01
School, minimum.....	2.00
Soda Fountain.....	.50
Soda Manufactory.....	7.00
Slaughter-house.....	\$3.00 to 10.00

Steam boiler, each horse-power to ten.....	1.00
Steam boiler, minimum.....	3.00
Steam-heated office, building per horse power of ten.....	1.00
Steam-heating, minimum.....	3.00
Stone work, per perch.....	.04
Store or shop.....	1.50
Urinal, public.....	1.50
Water-closet.....	.25
Water-closet, public.....	2.50
Wash basin, public.....	1.00

Provided that it shall be optional with said James A. Murray as to whether or not any consumer shall be placed upon a meter; and in the event that said Murray shall not desire to place any consumer upon a meter the rate to be charged for the use of water shall be in accordance with the foregoing schedule.

Section 6: The City of Pocatello shall be entitled to 100,000 gallons of water per day for city purposes, said water to be taken from standpipes erected by said James A. Murray, his successors, personal representatives and assigns, at such points as may be agreed upon hereafter, in the proportion of one standpipe to every four city blocks, the bounding streets of which are being sprinkled, and said standpipes shall be under the supervision and control of said James A. Murray, his successors, personal representatives or assigns. Said amount of water to be furnished free. [299] All water in excess of said 100,000 gallons, exclusive of water for fire purposes, taken by the city, to be paid for by said city, at the rate of five cents per thousand gallons, and the said

Water Company agrees that from the date of the approval of this ordinance it will gave a ten minute service for the filling of city water wagons from said standpipes.

Section 7: The foregoing rates and charges are hereby adopted by the City of Pocatello, by and for itself, and as trustee for the use and benefit of all private consumers of water within the corporate limits of said City for a period of ten years from and after the passage and approval of this ordinance. At the expiration of said time if the earnings of said water system shall exceed six per cent above reasonable expenses of operating and maintaining said system, upon the valuation of said water system as hereinafter set forth, or as may be ascertained as hereinafter provided, then the rates as set forth in the schedule of water rates of Section 5 of this ordinance may be readjusted so as to yield not less than six per cent above reasonable expenses on the valuation of said system as herein valued, or as it may be valued in the future in accordance with the provisions of this ordinance but no readjustment shall hereafter be made that will yield less than six per cent above reasonable expenses of operating and maintaining said system on the value of the investment ascertained as provided for in this ordinance.

Section 8: For the purpose of sale or the readjustment of rates the present valuation of the water system or plant, and all appurtenances thereto, owned by said James A. Murray, and referred to in this ordinance, is hereby fixed at the sum of Six Hundred Thousand Dollars. In the future in arriv-

ing at the valuation of the said plant or system, for either of said purposes, the value of all additions thereto, improvements thereof, and extensions and betterments made since the approval of this ordinance [300] (said value to be determined as hereinafter set forth) shall be added to said Six Hundred Thousand Dollars.

In arriving at the valuation of said extensions and improvements, in the future, not only the actual cost price thereof shall be taken into consideration, but also the value of the franchises, rights, business and good will, relating to said improvements and extensions, and such other things as are usually considered in the sale of a going business.

Section 9: If at the expiration of ten years, or at any time thereafter it should be deemed necessary to readjust rates under the provisions of Section 5, and if the City of Pocatello and said James A. Murray, or his successors or assigns cannot agree upon the valuation of the extensions and improvements of said water system for the purpose of such readjustment or sale then the valuation of such extensions and improvements shall be ascertained and determined in the following manner, to wit:

Said system shall be valued at Six Hundred Thousand Dollars upon the date of the approval of this ordinance, and for the purpose of arriving at the value of the improvements made to said water system since the approval of this ordinance, and for no other purpose, a committee of two experienced hydraulic engineers shall be selected, one by the City of Pocatello, who shall not be a resident of the State

of Idaho, and one by said James A. Murray, or his successors or assigns, and the following question shall be submitted to them:

What is the value of the extensions and improvements to said water system since the passage and approval of this ordinance?

If the two cannot agree they shall select a third and if they do not agree upon the third they shall request the president of the American Society of Civil Engineers to appoint a third member. The decision of a majority of the committee so selected shall fix the valuation of the extensions and improvements of said [301] water system from and after the passage of this ordinance, and said valuation plus Six Hundred Thousand Dollars shall be the value fixed for the purpose of readjusting said rates, and such decision shall be final.

Section 10: The City of Pocatello shall not hereafter grant to any individual corporation, or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held, hereby granted, confirmed and continued in said James A. Murray, nor shall the City of Pocatello build, acquire, own or operate a water system of its own until it has in good faith offered to purchase the water system of said James A. Murray, his successors or assigns at a price to be fixed as hereinbefore stated, to wit: Six Hundred Thousand Dollars plus the value of the extensions and improvements since the date of the approval of this Ordinance.

At intervals of ten years from and after the ap-

proval of this ordinance, and during the months of March, April and May in the years 1919, 1929, 1939 etc., the City may purchase the water system of said James A. Murray, or his successors or assigns, under the conditions specified in this section, but at no other time except by the mutual consent of the City and the owner of said water system.

For the purpose of sale to the City, the value of the improvements and extensions to said water system since the approval of this ordinance, shall be fixed in the same manner as is provided in this ordinance for the determination of the value of extensions and improvements for the purpose of readjustment of rates.

Said water system of the said James A. Murray, or his successors or assigns, shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, bonds, appliances, machines, tools, implements, [302] storage ground, material on hand, good will, value of the business as a business, and all rights and property of whatsoever kind either in use or on hand, and belonging to said James A. Murray in his capacity of furnishing water for any and all purposes to himself, and to his customers at Pocatello, Idaho, saving and excepting books and records. And in the event of the City of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said City, and the City shall receive and pay for the whole plant or

system, as aforesaid, the said James A. Murray stepping out and leaving all of said property undisturbed and ready for the City to step in.

Section 11. If within ninety days from and after the passage and approval of this ordinance the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion without unnecessary delays, interruptions or discontinuance, such compliance with this ordinance shall entitle the said James A. Murray, his successors or assigns, to the benefit of its provisions as in virtue of an executed contract, but if more than ninety days shall elapse without such commencement this ordinance shall be, and the same is hereby declared null and void.

Section 12: In consideration of the improvements and extensions named in this ordinance, the City of Pocatello shall maintain all present fire hydrants now in use, and shall establish and maintain additional fire hydrants on the mains of all extensions of said water system in the proportion of one additional fire hydrant to every seven hundred and twenty feet of water main extensions, and shall pay to said James A. Murray for said hydrants now in use a monthly rental of \$5.12½ each, payable monthly, and the same amount for all other additional fire hydrants hereafter established [303] from the date that the same shall be placed and connected. Water shall not be taken from any of said fire hydrants for any other than fire purposes.

Section 13: If at any time the said James A.

Murray, or his successors or assigns, fails to supply sufficient water for the needs of the City of Pocatello, and the inhabitants thereof, then it shall be optional with the City of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provisions of this ordinance, provided, however, that said James A. Murray shall have a reasonable time within which to complete the improvements contemplated by this ordinance, or such improvements as may hereafter become necessary to supply a sufficient supply of water as aforesaid, before the provisions of this section shall apply.

Section 14: All ordinances, or parts of ordinances in conflict herewith are hereby repealed.

Passed this day of, 1908.

.....,
City Clerk.

Approved this day of, 1908.

.....,
Mayor. [304]

**Complainant's Exhibit No. 7 [Letter (Unsigned)
Dated May 25, 1908, to George Winter, Superintendent Pocatello Water Co.].**

Pocatello, Idaho, May 25th, 1908.

Mr. George Winter,
Superintendent Pocatello Water Co.,
Pocatello, Idaho.

Dear Sir:—

In compliance with suggestions made at the conference of the Special Committee of the Council with you on the 23rd inst., the Committee have prepared

and herewith submit some of the objections that have been urged to Ordinance No. 180 submitted to the City Council by Mr. Murray, as follows, to wit:

1. Section 4 of said ordinance permits metering the city at the expense of the water users. The use of any meters should be at the expense of the Water Company.

2. Section 5 of said ordinance fixes the meter rate to be charged. The committee are not advised as to the measurement of water, and do not know whether the rates suggested are reasonable or not.

3. Section 6 of said ordinance provides that standpipes for taking sprinkling water should be provided by the city. The committee think that under the decisions of our Supreme Court that sufficient standpipes should be installed and maintained by the Water Company, at such places on established mains as may be designated by the City Council. The same section also allows 50,000 gallons of water per day for sprinkling purposes, the excess to be paid for at ten cents per thousand gallons. The committee are informed that the city, under the present ordinance, is entitled to 4,000 gallons for each fire hydrant in use, and there are fifty-three such hydrants, which would allow the city under present conditions something over 20,000 gallons daily for sprinkling purposes. The same section also provides that sprinkling streets shall be between [305] 8:00 P. M. and 7:00 A. M., which the committee think is impractical, and that such sprinkling would not provide against dust, nor serve the public satisfactorily.

4. Section 7 of said ordinance fixes time limit for rates mentioned in ordinance to be in force. The committee feel that it is beyond the power of the City Council to fix rates or to limit the time when they shall be operative, in as much as the manner of fixing rates and the time when such rates shall be effective are fixed by the statutes of the State, and the statutes appear to be mandatory. Said section also provides for fixing rates that shall yield interest at eight per cent per annum above expenses for maintenance and operation, upon the value of the plant at \$600,000.00 as it now exists, and at the same rate upon any extensions or improvements hereafter made. The committee are advised that Ordinance No. 86 now in force, provides for rates that will yield interest at the rate of five per cent upon the value of the plant, and do not feel that a rate of interest greater than five per cent upon the value of the plant would be justified.

5. Section 8 of said ordinance fixes present value of water system at \$600,000.00. The committee are not advised of the value of the plant and without further investigation do not feel competent to pass upon the question of value.

6. Section 9 of said ordinance provides for the readjustment of rates at the expiration of ten years under section 5 thereof, and for the valuation of extensions, additions and improvements, fixing the present valuation of \$600,000.00 as a basis of readjustment. The committee feel that a present valuation of \$600,000.00 is no criterion of value in ten years; that a plant of such value in ten years might

be worth more or less, depending upon conditions and circumstances intervening. And further the committee are not now competent to fix a present value. The method [306] of fixing value of extensions and improvements and the persons before whom the matter shall be submitted and fixed, does not commend itself to the committee.

7. Section 10 of said ordinance provides against granting franchises to others and against owning or acquiring another water system, until it has offered to buy the Pocatello Water Company's plant at \$600,000.00 plus the value of all extensions and improvements. The same objection to value and fixing values are made to this section, as to former sections relating thereto. The same section provides the intervals what the City may purchase said water system. The committee think there is no probability that the City may purchase said water system. The committee think there is no probability that the City will or can buy the plant, and do not feel that such conditions need to be provided against.

8. Section 12 of said ordinance seeks to bind the city to accept and pay for the use of fire hydrants to be placed on water main and extensions at distances not greater than two city blocks, wherever such mains or extensions may be. We are not prepared to say whether such hydrants would exceed the number now in use, but the committee do not feel like binding the city to any such conditions. The committee do feel, however, that if Mr. Murray should make the improvements contemplated, the city ought to be liberal

in the number of fire hydrants it will receive and pay for.

9. The committee further believes that the whole of Ordinance No. 180, except such parts as are objectionable, is covered by the provisions of Ordinance No. 86 now in force, unless it is the section referring to meters and that is objected to. [307]

10. The committee are advised, that D. Worth Clark, representing the Water Company, assured the Fire and Water Committee of the City Council at a conference had some time ago, that the only thing the Pocatello Water Company wanted was the right to meter persons who persisted in wasting water, and upon that privilege being given, the Company would be willing to bring in all the waters of Mink Creek at low water season, provide a sufficient number of additional goose necks for sprinkling purposes, connect the east and west side systems, make reasonable extensions and dismiss the suit now pending, and positively agreed to recommend such adjustment if a reasonable meter ordinance were passed. This committee is willing to and does recommend the passage, approval and publication of a meter ordinance, granting the Pocatello Water Company to enforce the use of a meter for measuring all water service public or private, at reasonable rates, the cost and expense of installing and maintaining such meters to be borne and paid by the Company.

Respectfully submitted.

[Endorsed]: "Complainant's Exhibit No. 7. A. L. Richardson, Clerk." [308]

**Complainant's Exhibit No. 8 [Ordinance No. 180 of
City Council of City of Pocatello].**

ORDINANCE NO. 180.

An ordinance granting a franchise to James A. Murray to construct, own and operate a water plant or system in the City of Pocatello, Idaho, and granting to said James A. Murray a right of way over, along and across the streets and alleys of the said City of Pocatello for the laying of water pipes and mains, and making a contract by the City of Pocatello, Bannock County, Idaho, with James A. Murray for supplying said city, and the inhabitants thereof, with water for public and private use, for extending the present water system and plant now operated in said city by James A. Murray and used for the purpose of supplying said City, and the inhabitants thereof, with water for public and private use, fixing the rates to be charged for said water, fixing the present valuation of said water plant, providing a plan for ascertaining the value of said water plant in the future as a basis of readjusting rates, or as a basis of valuation in the event of the sale of said plant, and waiving the right on the part of the said City to build or acquire a competitive water system except under stated conditions, or of granting to others more favorable terms or franchises than the terms and franchises now held and hereby granted to said James A. Murray, by this ordinance.

PREAMBLE.

Whereas the then town or village of Pocatello on the 4th day of January, 1892, by an ordinance duly

passed and authorized, granted to F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right authority and permission to construct, maintain and operate an entire and complete water system of water mains, pipes and conduits for the purpose of furnishing and supplying said town or village of Pocatello, [309] and the inhabitants thereof, with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant.

And whereas the said F. D. Toms, John J. Cusick and James A. Murray and their associates, successors and assigns fully complied with said conditions precedent, and obtained vested rights under said grant.

And whereas the City of Pocatello is a city of the second class and is the legal municipal successor of said village of Pocatello.

And whereas a commission duly appointed and constituted did on or about the first day of September, 1906, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, the then owner and holder of said privileges and franchises for both public and private uses, which said rates were confirmed and continued by the provisions of ordinance No. 56, approved June 8, A. D. 1898.

And whereas said James A. Murray thereafter succeeded to and became, and is now the owner and holder of all the property of whatever kind and nature formerly owned or held by said Pocatello Water Company, including the said water system or plant complete, and all rights, privileges and fran-

chises appurtenant thereto, or used therewith.

And whereas the City of Pocatello on the 6th day of June, 1901, by Ordinance No. 86, ratified, continued and confirmed unto James A. Murray, and to his successors and assigns, according to the terms of said original grant and ordinance, the privileges and franchises originally granted, given and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns as recited in Pocatello town or village Ordinance No. 46 passed and approved January 4, 1892, the said [310] James A. Murray being at that time the legal successor of said F. D. Toms, John J. Cusick and James A. Murray therein named.

And whereas the said James A. Murray is now the owner and holder of said water system or plant complete, and all rights, privileges and franchises appurtenant thereto or used therewith, and all rights, privileges and franchises granted by said Ordinance No. 86, passed on the 6th day of June, 1901, and also all rights, privileges and franchises granted to said F. D. Toms, John J. Cusick and James A. Murray and their associates, successors, and assigns as recited in Pocatello town or village ordinance No. 46 passed and approved January 4, 1892.

And whereas disputes have arisen between the City of Pocatello and said James A. Murray as to the construction to be placed upon said ordinance, and said City of Pocatello has complained, and is now complaining on account of the amount of water said James A. Murray is able to furnish to said city, and its inhabitants, in accordance with said ordinance,

contracts and franchises.

And whereas the City of Pocatello now claims that the present supply of water furnished by said water system is inadequate for the present and future needs of said city, and is threatening to commence suit against said James A. Murray on account of such inadequate supply, and is threatening to attempt to declare forfeited the franchises heretofore granted.

And whereas it is the desire of both of said City of Pocatello and said James T. Murray that all differences and disputes between them *by* settled and adjusted amicably, and without resort to the courts, and finally.

And whereas it is necessary in order to make such amicable adjustment for James A. Murray to replace the present pipe-line by a larger pipe to bring in the surplus waters of Mink Creek owned by said Murray, at the present time, and to make extensions of street mains in said city, thereby necessitating the laying [311] of several miles of pipe at an additional expenditure of a large sum of money.

And whereas said James A. Murray before incurring so great an additional expense, and before agreeing to the bringing in of said additional waters, as a condition precedent to the expense of laying said pipe, desires to be protected against unreasonable or arbitrary changes in the rates for water and water service, and also desires to have a present valuation placed upon the water plant as now existing as a basis for fixing rates and charges for water service in the future, and also as a basis of valuation for sale under the terms of this ordinance in the future, and asks some assurance that unreasonable

or arbitrary changes shall not be made, and asks that a present valuation be placed upon said plant as a basis for future changes, if any that may be made in said water rates or charges, and as a basis for the valuation of said plant in the event of sale, or taking over of the same by the said City in the future, under the terms and provisions of this ordinance.

And whereas the demand of said James A. Murray in said respect is considered reasonable and just, and it is deemed to be for the best interests of the City of Pocatello to extend and give the assurance asked for, and to enter into this contract with said James A. Murray.

Now, therefore, be it ordained by the Mayor and City Council of the City of Pocatello, Idaho:

Section 1: That there is hereby given, conferred and granted unto James A. Murray, his successors, personal representatives and assigns, the right, authority, privilege and permission to construct, maintain and operate as now constructed, or as may hereafter be desired by said James A. Murray, an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and [312] public highway within the corporate limits of the City of Pocatello, Idaho, for the purpose of laying along, over and under said streets, alleys and public highways water mains, pipes and conduits for the purpose of furnishing and supplying said City of Pocatello, and the inhabitants thereof, with a sufficiency of pure and healthful water.

Section 2: That all the rights, privileges and

said James A. Murray under and by virtue of Pocatello town or village Ordinance No. 46, passed and approved January 4, 1892, or under Ordinance No. 86 of the City of Pocatello, passed and approved June 6, franchises, and all property owned and acquired by 1901, are hereby ratified, continued and confirmed unto James A. Murray and to his successors and assigns.

Section 3: The grant of privileges mentioned and contained in this ordinance unto said James A. Murray, his successors, personal representatives and assigns, shall be continued and exist for a period of fifty (50) years from and after the passage and approval of this ordinance.

Section 4: The right, privilege and permission is hereby granted and conferred upon James A. Murray, his successors, personal representatives and assigns to install meters to measure all water service public or private within the City of Pocatello, Idaho, said meters to be installed and maintained at the expense of users thereof.

Section 5: The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the said James A. Murray to the City of Pocatello, and the inhabitants thereof, shall hereafter be as hereinafter stated, to wit:

SCHEDULE OF METER RATES.

Water for the use of the inhabitants of said City of Pocatello: **[313]**

100 to	500 Gallons	per day	50¢	per thousand	gallons.
500 "	1500 "	" "	40¢	" "	" "
1500 "	3000 "	" "	35¢	" "	" "
3000 "	5000 "	" "	30¢	" "	" "
5000 "	10000 "	" "	25¢	" "	" "
10000 "	20000 "	" "	20¢	" "	" "

But in no case shall the minimum monthly charge for water delivered by meter measurement be less than the following schedule of water rates, which said rates are hereby fixed as the minimum monthly charge for all water delivered to the inhabitants of the City of Pocatello, by meter measurement, to wit:

Bakery, for each baker.	\$2.00
Bannock County (all water used in courthouse and jail	10.00
Barber-shop, first chair.....	1.00
Each additional chair.....	.25
Bath, public, first tub.....	1.50
Each additional tub.....	.75
Beer-house.....	\$2.00 to \$3.50
Billiard saloon, with bar.....	\$2.00 to \$3.50
Blacksmith-shop, per forge.....	.50
Bookbindery, per hand.....	.50
Bookbindery, minimum.....	1.50
Brickyard, per gang.....	2.50
Brickwork, per thousand.....	12½
Butcher-shop.....	2.00
Butcher-shop, with steam boiler.....	4.50
Candy factory.....	2.00
Carriage-shop, minimum.....	2.00
Carriage-shop, each hand.....	.50
Church.....	1.50
[314]	
Cigar factory, per hand.....	.25
Cigar factory, minimum.....	2.00
Clubrooms and halls.....	1.50
Coffee saloon.....	2.00

Confectionery.	2.00
Cow. ....	.25
Drug-store.	2.00
Dyeing or scouring works.	3.00
Fire-plugs, for fire only (private). ....	.50
Fountain, 1/4 inch jet.	6.00
Horse, mule or cow. ....	.25
Hose for private stable. ....	.50
Hotel or boarding-house, per room. ....	.25
Hotel or boarding-house, minimum.	3.50
Hot-water heating plant.	\$2.00 to 5.00
House or private residence.	1.50
Each bath in private residence. ....	.50
Each water-closet. ....	.25
Laundry.	\$5.00 to 30.00
Lawn sprinkling, first lot.	1.00
Each additional lot. ....	.50
Liquor store.	\$2.00 to 2.50
Livery-stable, first stall. ....	.40
Each additional stall. ....	.25
Livery-stable, per vehicle. ....	.20
Minimum for livery-stable.	2.50
Office, doctor, lawyer, etc.	1.00
Each additional occupant. ....	.25
Oyster saloon, each table, four to six persons. ....	.50
Oyster saloon, minimum.	2.00
Photograph gallery.	3.00
Plastering, per yard.	3/4
[315]	
Concrete, per c. ft. ....	.01
Printing office, per hand. ....	.50
Printing office, minimum.	1.50

Restaurant, each table of six persons.....	.50
Restaurant, minimum.....	3.00
School, each pupil.....	.01
School, minimum.....	2.00
Soda fountain.....	.50
Soda manufactory.....	7.00
Slaughter-house.....	\$3.00 to 10.00
Steam boiler, each horse-power to ten.....	1.00
Steam boiler, minimum.....	3.00
Steamheating office, building per horse-power of ten.....	1.00
Steam-heating, minimum.....	3.00
Stone work, per perch.....	.04
Store or shop.....	1.50
Urinal, public.....	1.50
Water-closet.....	.25
Water-closet, public.....	2.50
Wash basin, public.....	1.00

Provided that it shall be optional with said James A. Murray as to whether or not any consumer shall be placed upon a meter, and in the event that said Murray shall not desire to place any customer upon a meter, the rate to be charged for the use of water shall be in accordance with the foregoing schedule.

Section 6: The City of Pocatello shall be entitled to 50,000 gallons of water per day for city purposes, said water to be taken from standpipes erected by said city, and the said standpipes shall be under the supervision and control of said James A. Murray, his successors, personal representatives or assigns. said amount of water to be furnished free. All water in excess of 50,000 gallons, [316] exclusive of

water for fire purposes, taken by the city, to be paid for by said city at the rate of ten cents per 1000 gallons. Said City of Pocatello will take all water to be used for sprinkling purposes from said standpipes between the hours of 8:00 P. M. and 7 A. M., and the Water Company agrees that from the date of the approval of this ordinance, it will give a ten minute service for the filling of city water wagons. Additional standpipes to be placed and maintained at the expense of the City, and to be under the supervision of said James A. Murray, his personal representatives and assigns, at such points as may be designated by the City.

Section 7: The foregoing rates and charges are hereby adopted by the City of Pocatello by and for itself, and as trustee for the use and benefit of all private consumers of water within the corporate limits of said city for a period of ten years from and after the passage and approval of this ordinance. At the expiration of said time if the earnings of said water system shall exceed eight per cent. above reasonable expenses of operating and maintaining said system, upon the value of said water system as hereinafter set forth, or as may be ascertained as hereinafter provided, then the rates as set forth in the schedule of water rates of Section 5 of this ordinance may be readjusted so as to yield not less than eight per cent. above reasonable expenses on the valuation of said system as herein valued, or as it may be valued in the future in accordance with the provisions of this ordinance, but no readjustment shall hereafter be made that will yield less than eight per

cent. above reasonable expenses of operating and maintaining said system on the value of the investment ascertained as provided for in this ordinance.

Section 8: For the purpose of sale or the readjustment of rates the present valuation of the water system or plant, and all appurtenances thereto, owned by said James A. Murray, and referred to in this ordinance, is hereby fixed at the sum of [317] Six Hundred Thousand Dollars. In the future in arriving at the valuation of said plant or system, the expense of all additions thereto, improvements thereof, and extensions and betterments made since the approval of this ordinance (said value to be determined as hereinafter set forth) shall be added to said Six Hundred Thousand Dollars.

In arriving at a valuation of said extensions and improvements in the future, not only the actual cost price thereof shall be taken into consideration, but also the value of the franchises, rights, business and good will, relating to said improvements and extensions, and such other things as are usually considered in the sale of a going business.

Section 9: If at the expiration of ten years, or at any time thereafter it should be deemed necessary to readjust rates under the provisions of Section 5, and if the City of Pocatello and said James A. Murray, or his successors or assigns cannot agree upon the valuation of the extensions and improvements of said water system for the purpose of such readjustment, then the valuation of such extensions and improvements shall be ascertained and determined in the following manner, to wit:

Said system shall be valued at Six Hundred Thousand Dollars upon the date of approval of this ordinance, and for the purpose of arriving at the difference between the value of said water system at the time such valuation may be made, and the value of it at the time of the passage and approval of this ordinance, and for no other purpose, a committee of two experienced hydraulic engineers shall be selected, one by the City of Pocatello, who shall not be a resident of the State of Idaho, and one by said James A. Murray, or his successors or assigns, and the following question shall be submitted to them:

What is the value of the extensions and improvements to said water system since the passage and approval of this ordinance? [318]

If the two cannot agree they shall select a third, and if they do not agree upon a third they shall request the President of the American Society of Civil Engineers to appoint a third member. The decision of a majority of the committee so selected shall fix the amount of the increase in the valuation of said water system from and after the passage of this ordinance for the purpose of readjusting said rates, and such decision shall be final.

Section 10: The City of Pocatello shall not hereafter grant to any individual corporation or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held hereby granted confirmed and continued in said James A. Murray, nor shall the City of Pocatello build, acquire, own or operate a water system of its own until it has on

good faith offered to purchase the water system of said James A. Murray, or his successors or assigns, at a price to be fixed as hereinbefore stated, to wit, Six Hundred Thousand Dollars plus the value of the extensions and improvements since the date of the approval of this ordinance.

At intervals of ten years from and after the approval of this ordinance, and during the months of March, April and May in the years 1919, 1929, 1939, etc., the city may purchase the water system of said James A. Murray, or his successors or assigns, under the conditions specified in this section, but at no other time except by the mutual consent of the City and the owner of said water system.

For the purpose of sale to the City, the value of the improvements and extensions to said water system since the approval of this ordinance, shall be fixed in the same manner as is provided in this ordinance for the determination of the value of extensions and improvements for the purpose of readjustment of rates.

Said water system of the said James A. Murray, or his successors or assigns, shall be held to mean and include, all of [319] the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, appliances, machines, tools, implements, storage ground, material on hand, good will, value of the business as a business, and all rights and property of whatsoever kind either in use or on hand, and belonging to said James A. Murray in his capacity of furnishing water for any and all pur-

poses to himself, and to his customers at Pocatello, Idaho, saving and excepting account books and accounts. And in the event of the City of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said city, and the city shall receive and pay for the whole plant or system, as aforesaid, the said James A. Murray stepping out and leaving all of said property undisturbed and ready for the city to step in.

Section 11: If within ninety days from and after the passage and approval of this ordinance the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion without unnecessary delays, interruptions or discontinuance, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefit of its provisions as in virtue of an executed contract, but if more than ninety days shall elapse without such commencement this ordinance shall be, and the same is, hereby declared null and void.

Section 12: In consideration of the improvements and extensions named in this ordinance, the City of Pocatello shall maintain all present fire hydrants now in use, and shall establish and maintain additional fire hydrants on all mains of said water system, and on all extensions thereof, at a distance of not greater than two city blocks between each hydrant, and shall pay to said James A. Murray for said hydrants now in use a monthly rental of [320] \$5.12½ each,

payable monthly, and the same amount for all other additional fire hydrants hereafter established from the date that the same shall be placed and connected. Water shall not be taken from any of said hydrants for any other than fire purposes.

Section 13: If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the City of Pocatello, and the inhabitants thereof, then it shall be optional with the City of Pocatello to secure a further supply of water from any other source directly or indirectly without reference to the provisions of this ordinance, provided however, that said James A. Murray shall have a reasonable time within which to complete the improvements contemplated by this ordinance or such improvements as may hereafter become necessary to supply a sufficient supply of water as aforesaid, before the provisions of this section shall apply.

Section 14: All ordinances, or parts of ordinances in conflict herewith are hereby repealed.

Passed this day of, 1908.

.....,

City Clerk.

Approved this day of, 1908.

.....,

Mayor.

State of Idaho,

County of Bannock,—ss.

I, Thomas D. Gilmore, hereby certify that the within and foregoing is a full, true and perfect copy of ordinance No. 180 presented to the City Council of the City of Pocatello, at its regular meeting on the

21st day of May, 1908, and read the first time, said ordinance being now pending, as the same appears from the original of said ordinance on file and as appears from the records of my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said City on this the 25th day of May, 1908.

[Seal]

THOMAS D. GILMORE,
City Clerk. [321]

Complainant's Exhibit No. 10 [Letter, Dated August —, 1905, George Winter, Superintendent Pocatello Waterworks, to Walter H. Cleare, Mayor of City of Pocatello.]

No. 147.

Filed April 26, 1913. A. L. Richardson, Clerk.

FIRE

PROTECTION

A Letter

from

GEORGE WINTER

Superintendent of the

Pocatello Waterworks

to

WALTER H. CLEARE

Mayor of the City of

Pocatello.

August, 1905. [322]

James A. Murray vs.

FIRE

PROTECTION

A Letter

from

GEORGE WINTER

Superintendent of the

Pocatello Waterworks

to

WALTER H. CLEARE

Mayor of the City of

Pocatello.

August, 1905. [323]

Pocatello, Idaho, August, 1905.

WALTER H. CLEARE, Mayor,

Pocatello, Idaho.

Sir:—

In reply to a request for a map showing the number and location of the fire hydrants in the streets of the City of Pocatello, and a letter from the Water Company, showing what protections are made for fire protection in this city, with a view to the reduction of fire insurance rates, I have this day furnished the Chief of the Fire Department with a blue print, showing the number and location of the fire hydrants, as requested. The water supply for the city is obtained from mountain streams at a great elevation above the city, and is stored in three reservoirs, with a capacity of about five millions of gallons. The reservoirs are arranged one above the other, on

the hillside south of the city. The elevation of the lower reservoir above the city is about 265 feet, and this gives a static pressure of 115 pounds to the square inch. [324]

This reservoir has a capacity of about half a million gallons, and has hitherto supplied the city. The upper reservoir is nearly 600 feet above the city, and has a capacity of about three million gallons. It has hitherto been used as a storage reservoir, the pressure from it being too heavy to be connected with the city mains. In a few days the Water Company hopes to be able to connect the new or middle reservoir, and to cut out the lower one and repair it against contingencies. The new reservoir will have a capacity of two and one-fourth millions of gallons or more, and will give a static pressure in the city of about 150 pounds to the square inch. The water from this reservoir is conducted to the foot of the bluff by an 18-inch main. At this point it branches by means of a "Y," one arm of which connects with the old main on the southern side of the city, running out to The Academy, and feeding, at the southern end, all the laterals on the streets running parallel to Harrison Avenue. The other branch of the "Y" will, in the near future be extended along the west side of the river to a point in the neighborhood of Greeley street, where it will turn east across the river, and intersect streets parallel to Harrison Avenue, thus feeding the laterals on those streets at the northern end also.

When this work is completed a better circulation and a more uniform distribution than heretofore will

be affected throughout the city. The branch of the "Y" on the west side will not be completed this year, but the additional pressure from the new reservoir and the enlarged main, I think, make a marked improvement when compared with the old reservoir, which has served the city so well and has given excellent satisfaction and fire protection for many years.

In view of your having called a mass meeting to discuss the present water situation, and to secure an improvement of the same, etc., etc., as you put it, I am unable to comprehend what part [325] this map and letter can play in obtaining a reduction in fire insurance rates as you stated. I don't understand why you requested the Superintendent of the Water Company to prepare a map and letter setting forth the sufficiency of the water supply, and at the same time called a mass meeting to discuss a water famine, before you had heard from the Water Company, or had any knowledge of the true situation. It doesn't appear to me that your mass meeting is in line with your request. It is hardly probable that the insurance companies will be induced to lower rates in Pocatello after the newspapers have written up your mass meeting and what you said about water famine and want of snow and moisture in the hills. It appears to me that it would rather tend to scare the insurance into raising rates instead of lowering them, notwithstanding the fact that the water service in Pocatello is among the best in the country, and in my opinion, unequalled by a city of its size anywhere.

I am unable to see what good purpose you have served by calling a mass meeting and appointing a committee to ask the Water Company a few questions that its manager would have answered if asked by any citizen on the street corner. For your information the questions and the answers are herewith appended. Until I read about your mass meeting, and appeared before your committee, I was not conscious that the Water Company, or its owner, or its manager, had done any injury to Pocatello or to its people. I know that Mr. Murray had no evil intentions in building the water works, and that my efforts have been directed to carrying out his wishes, at great expense to himself, in an honest endeavor to provide for Pocatello a good supply of the best water obtainable. If we succeed, we shall be glad; if our efforts fail, we hope at least that our attempt is not criminal; and we submit that it is not worthy of the Mayor of the second city of the State of Idaho to agitate that the Water Company be punished and despoiled because he happens to think it is not perfect. The Water Company has surely done some [326] good in Pocatello, and we submit that it is hardly fair to punish it for that, even though it may not be as good and worthy, or have accomplished as much as the Mayor.

Why, Mr. Mayor, did you not invite the Superintendent of the Water Company to your mass meeting? You took considerable pains not only to invite, but to importune, other citizens, even after they told you they had no complaint to make. From the stenographer's report, which is before me, I learn

that you could not get a man in the audience to accept the chairmanship of your meeting; that the business men of the city were not represented; and that you decided that no chairman was necessary. It appears to me that you might have gone further, and decided with better reason that no meeting was necessary, either. No allegations were made at the meeting that anybody was wronged or injured, nor has a single complaint to that effect been heard up to this writing, not even from your committee, one-half of whom, only, responded to your appointment. I would suggest, sir, that you have this defect cured when you call your next mass meeting. You might advertise for complaints. In the call for your last one you insinuated that some advantage might accrue to your congregation, and when they came, expecting to get it, you had nothing to offer. You didn't even suggest anything. You were not well enough informed to answer any questions. You made a speech incriminating the Almighty, and exonerating everyone else from responsibility for the lack of moisture and snow in the hills—I think your exoneration included the Water Company—but you had no remedy to offer; no revelation or knowledge to impart that was not known to the least intelligent person in your audience. As a matter of fact, the great majority of your audience know more about water than you are likely to learn in a dry-goods store, this year anyway. If, instead of a mass meeting, your Honor had called a prayer-meeting you might have done better. You could thus, in your capacity of edu-

cator, have [327] instructed the Almighty what to do, and, in your capacity of politician, its cheap notoriety would have appealed to you—if you had only thought of it. You didn't know how to nourish the trees in your own lot until I taught you, and even then you have profited little by instruction. Such being the case, sir, is it not rather ambitious in you to offer instruction in the business of providing water for the city?

I gave you good advice on this subject long ago, but, like to the tending to your own trees, you have profited little by instruction. Have I not told you that you could not use the Water Company as an advertisement to sell dry-goods? When you asked me what you should say to your customers about water, didn't I tell you that in my opinion it would be proper for you to say you didn't know, and to refer them to the water office; that I didn't need an intermediary; and that you would save yourself and me much trouble by attending to your own affairs, and not meddling in matters of which you understood nothing? You know that you understand no more about water supply problems than I do about selling dry-goods. Why, then do you meddle with them? I am unable to find a motive for your action, except it be a desire to injure me personally, even if by so doing you would injure the city as well, and I hesitate to accuse the Mayor of the second city of Idaho with being actuated by vulgar spite, instead of business principles. I shall, therefore, accuse you of nothing. I shall, however, state the facts, and leave

the community to draw such conclusions as it may see fit.

I have already stated that I have had occasion to tell you to mind your own business. I have had occasion to do more than tell you—I have had occasion to compel you, and I may have to do it again. I am not seeking it; I would rather avoid it; but if the [328] necessity arises I shall not shirk it. Now for the facts:

Some time ago I presented to you a written request, numerously signed by responsible citizens and property owners, to move the pesthouse out of the heart of the city. It was signed by every doctor in town, excepting Dr. Bean, your City Physician. Nevertheless and notwithstanding, both of you refused to move the pesthouse until steps were taken to compel you. Dr. Bean refused to comply with a request which it ought not to be necessary to make to a doctor. You refused to compel him to comply until you were yourself compelled, through fear of legal proceedings. At my request, a number of attorneys consulted together and discussed the pesthouse nuisance, and one of them was appointed to see you and to point out to you what action would be taken against you if you permitted another case of smallpox or other contagious disease to be put into a room annexed to a public lodging house in the heart of this city. You replied to that gentleman that it would be better for me to provide more water for the city and pay less attention to smallpox, or that your time was taken up talking about water to your customers—or words to that effect, which I understood at that

time merely as an expression of annoyance on your part because I had compelled you and the City Physician to perform a duty which health officers not utterly lost to all consideration for the public health would have done of their own volition. This was about the middle of June, when there was water enough and to spare everywhere. I did not at that time regard your words as a threat.

Now mark what follows: You called a mass meeting, "To endeavor to secure an improvement," as you put it, and at that meeting the wife of the City Physician and yourself were the principal speakers. There were other ladies present, but, according to the stenographer's report, which is before me, only these two spoke. I think these facts are fairly well known, and I leave the people [329] to judge whether your language to the attorney who called upon you about the pesthouse matter implied a threat to get even or not. Perhaps not. Maybe you just can't help it.

The late City Attorney tells the following story: At the encampment at American Lake last summer, where he was present as a member of the Idaho National Guard, one of the men, for some breach of discipline, was confined in the guardhouse. The officer of the day ordered a corporal to take the prisoner out and have him clean up around the house. The latter approached the prisoner delicately, saying, "This way, please." "That," said the officer, "is not a proper way. You musn't say 'please,'; you must give him an order." "That's the way I talk, sir," said the corporal. "I am a clerk in a

dry-goods store, and I just can't help it."

You persuaded some members of the city council to lend you their support to call a mass meeting. You just couldn't assume the responsibility yourself. You wanted to be forced into it, just as you were forced to accept the nomination for mayor. You just couldn't help it. "Persuaded," I say, for the idea was yours, not theirs; and they yielded to your importunity because they still had some confidence in you, and like many others who helped to elect you to a high office, they were loath to admit, even to themselves, that they had voted for a General Coxey.

I remember your telling me that you had taken President Roosevelt for your model, and would endeavor to follow in his footsteps, (Sic;) of your high ideals and your good intentions, and what you expected to do and to be; that in order to qualify yourself for a mayor you had served a term in the city council, and to qualify yourself for a governor, you would, I suppose, serve a term as mayor, and then United States Senator and President, or perhaps, dictator. How perfectly lovely. What an unbroken record, or, as Gladstone said of my Lord Beaconsfield, "Intoxicated with its own success." This is what you were going to be before election. [330] Now that it is long enough after election to give the public a taste of your quality, it may not be out of place to tell you what you are: A dry-goods clerk selling frippery to women. Did you ever hear of President Roosevelt calling a mass meeting to find out from it what to do, or to pay off an old score? I think not. Did any man of dignity, holding a high

office, ever do such a thing before? I think not. Did anyone but a demagogue ever do it? I think not. You side-stepped behind a committee, turned Center street into a "Midway," and fled the country "under pretense of business indispensable."

Now hearken unto the Oriental story of the barber's fifth brother, and learn what you have done unto yourself:

"THE STORY OF THE BARBER'S FIFTH BROTHER.

My fifth brother, he of the cropt ears, O Commander of the Faithful, was a poor man, who used to ask alms by night and live by day on what he got thus. Now, our father, who was an old man, far advanced in years, fell sick and died, leaving us seven hundred dirhems. So we took each of us a hundred; but when my brother received his share he was at a loss to know what to do with it, till he bethought him to buy glass of all sorts and sell it at a profit. So he bought a hundred dirhems' worth of glass and putting it in a great basket, sat down, to sell it, on a raised bench at the foot of a wall, against which he leant his back. As he sat, with the basket before him, he fell to musing in himself, and said, I have laid out a hundred dirhems on this glass and I will sell it for two hundred, with which I will buy other glass and sell it for four hundred, nor will I cease to buy and sell thus, till I have gotten much wealth. With this I will buy all kinds of merchandise and jewels and perfumes and gain great profit on them, till, God willing, I will make my profit a hundred thousand dirhems. Then I will buy a hand-

some house, together with slaves and horses and trappings of gold, and eat and drink, nor [331] will I leave a singing man or woman in the city but I will have them to sing to me. As soon as I have amassed a hundred thousand dirhems, I will send out marriage brokers to demand for me in marriage the daughters of kings and viziers; and I will seek the hand of the vizier's daughter, for I hear that she is perfect in beauty and of surpassing grace. I will give her a dowry of a thousand dinars, and if her father consent, well; if not, I will take her by force, in spite of him. When I return home I will buy ten little eunuchs and clothes for myself such as are worn by kings and sultans and get me a saddle of gold, set thick with jewels of price. Then I will mount and parade the city, with slaves before and behind me, whilst the folk salute me and call down blessings upon me. After which I will repair to the vizier, the girl's father, with slaves behind and before me, as well as on my either hand. When he sees me he will rise and seating me in his own place, sit down below me, for that I am his son-in-law. Now, I will have with me two eunuchs with purses, in each a thousand dinars, and I will deliver him the thousand dinars of the dowry, and make him a present of other thousand, that he may have cause to know my nobility and generosity and greatness of mind, and the littleness of the world in my eyes; and for ten words he proffers me I will answer him two. Then I will return to my house, and if one come to me on the bride's part, I will make him a present of money and clothe him in a robe of honor;

but if he bring me a present, I will return it to him and will not accept it; that they may know that I am great of soul. Then I will command them to bring her to me in state and will order my house fittingly in the meantime. When the time of the unveiling is come, I will don my richest clothes and sit down on a couch of brocaded silk, leaning on a cushion and turning neither to the right nor to the left, for the haughtiness of my mind and the gravity of my understanding. My wife shall stand before me like the full moon, in her robes of [332] ornaments, and I, of my pride and my disdain, will not look at her, till all who are present shall say to me, 'O, my lord, thy wife and thy handmaid stands before thee; deign to look upon her, for standing is irksome to her.' And they will kiss the earth before me many times whereupon I will lift my eyes and give one glance at her, then bend down my head again. Then they will carry her to the bride's chamber and meanwhile I will arise and change my clothes for a richer suit. When they bring in the bride for a second time, I will not look at her till they have implored me several times, when I will glance at her and bow down my head; nor will I leave to do this, till they have made an end of displaying her, when I will order one of my eunuchs to fetch a purse of five hundred dinars and giving it to the tire-women, command them to lead me to the bride chamber. When they leave me alone with the bride, I will not look at her nor speak to her, but will lie by her with averted face, that she may say I am high of soul. Presently her mother will come to me and kiss my head and my hands and say

to me, 'O, my lord, look on thy handmaid, for she longs for thy favor, and heal her spirit.' But I will give her no answer; and when she sees this, she will come and kiss my feet repeatedly and say, 'O, my lord, verily my daughter is a beautiful girl, who has never seen man; and if thou show her this aversion, her heart will break; so do thou incline to her and speak to her.' Then she will rise and fetch me a cup of wine, and her daughter will take it and come to me; but I will leave her standing before me, whilst I recline upon a cushion of cloth of gold, and will not look at her for the haughtiness of my heart, so that she will take me to be a sultan of exceeding dignity and will say to me, 'O my lord, for God's sake do not refuse to take the cup from thy servant's hand, for indeed I am thy handmaid.' But I will not speak to her, and she will press me, saying, 'Needs must thou drink it', and put it to my lips. Then I will shake my fist in her face and spurn her with my foot thus. So saying, he gave *the* a kick with his foot and [333] knocked over the basket of glass, which fell to the ground, and all that was in it was broken."

Thus you see what you have done unto yourself. As a mayor you have kicked over *the* smashed into fragments your basket of glassware—the only foundation of your vaulting ambition, and now you'll never be President. As someone observed of ex-Minister Bowen—at the psychological moment when you ought to have been energetically silent, you spoke. You just couldn't help it, and now you will

never, never be president, nor, as Tom Reed said, right either.

Who, sir, is most interested in the welfare of Pocatello and its people—you, or the Water Company? What money have you ever invested in Pocatello to benefit its citizens, or to benefit anybody but yourself? What cause do you champion but your own? Is it not apparent to any honest man with brains, that if any hardship should be wrought upon this little city, no one would suffer so badly as the Water Company? Not even the Railroad Company itself, for the Railroad Company can do business very well without Pocatello, but the Water Company can't. The difference between you and the Water Company is this, your Honor: You sell frippery to women at a profit; the Water Company sells a necessity to everybody at a loss. You protecting the people from the Water Company ! ! ! ! Who are you, anyway? A dry-good's clerk, aren't you? Selling pins, aren't you? Pin-selling and protecting of the poor don't go well together, do they? O, pin-seller and protector of the poor! Who is protecting you? Why, man, the Water Company is! James A. Murray put his money in a desert and built a waterworks at a loss to make a city possible where no man could dwell before, and where you now sell pins at a profit and make a living off the inhabitants. For a preacher your knowledge is singularly defective and your [334] ideas of cause and effect sadly mixed. It was not Adam who created the earth and planted the Garden of Eden—it was the Lord God who created man and the earth and all that is therein.

Adam was a weakling who hearkened unto the voice of Eve, disobeyed the command of the Creator and was expelled from the Garden which the Lord had prepared for him. Adam was the father of Cain. (See Genesis 1, 2 and 3.) It was not Ananias who led the Israelites out of bondage—it was Moses—Ananias was the man who was struck dead for cheating and lying. It was not Barabbas who went preaching in the wilderness preparing the way for Christ—it was John the Baptist—Barabbas, in his day, was a noted robber. It was not Judas Iscariot who scourged the hucksters out of the Temple—it was Jesus—Judas Iscariot was the man who betrayed Christ for money and afterwards hanged himself. It was not Christ who loved to pray standing in the synagogues and in the corners of the streets, that he might be seen of men—it was the Pharisees and hypocrites who set the evil example. (See Matthew 6:5, 23:2-34.) You protect the people from the Water Company !!! Who is protecting the people from you? Why, your Honor, it is the Water Company. And for this reason I write this letter, to tear from off your borrowed raiment, that you may stand revealed just as you are—a dry-goods clerk, who, by the judgment of God, and the want of it in man, is the mayor of this city also. Not on your account, sir, but for the good of the community, do I write this letter. In your capacity of huckster I have nothing against you, and don't care to know you.

If this letter wounds your self-esteem I regret it. It is a very disagreeable task for me indeed, but the interests involved are too great to be dominated by a

dry-goods advertisement. Besides, you had fair warning. The best interests of the people, and of the Water Company as well, demand an able administration of the city's business, and no private consideration for you or myself will influence me to turn aside or shirk my duty in the premises. [335]

I write you in your capacity of mayor, in which you are a failure. In your miscellaneous other capacities of dry-goods clerk, philanthropist, sport, preacher and politician, etc., etc., etc., you may, for all I know, be a howling success, but I doubt it. You are as many different persons as the fellow in the Mikado, who was lord chief justice, the lord bishop, the lord high admiral, etc., etc., etc., and who, when he gave his advice in one capacity, declared in some other capacity that his former advice was highly immoral. There is, however, one great difference between the fellow in the Mikado and yourself. He was appointed to his miscellaneous offices by authority; you have appointed yourself without *authorith*, like Coleridge's cannibal, the Ancient Mariner, who made himself a whole ship's crew, after he had eaten up all the others, and went around singing:

I am a cook and a captain too,

And the mate of the Nancy brig,

A bos'n tight, and a midshipmite,

And the crew of the captain's gig.

Why did you close the "Honky Tonk" on Barbary Coast and start a Midway Plaisance on the main streets of the city where the people can't escape it, and where the women who danced seemingly waltzes in the seclusion of the "Honky Tonk" now dance the

“Hoochee Kooche” nightly on the Midway? Why have you filled the principal streets in the town with freaks, fakirs, mountebanks and painted harlots, flaunting vice in the public eye, where they can sow more corruption in one night than the “Honky Tonk” in ten years? In the language of the fakir at your street orgy, “This performance is especially adapted to women and children,” and the “Hoochee-Koochee” dance is a highly moral and instructive entertainment for the young in an educational center. In your capacity of Academy trustee, did you invite the students to join in the debauch, ostensibly to raise funds for a hospital? Why, man, with you, the immaculate Statesman isn’t in it, and Rees Davis said that compared [336] with the Idaho Daily Statesman, Elijah the Tishbite, who was translated to heaven in a chariot was just a sodden lump of sin. Maybe Mr. Davis was ironical. Maybe he meant that the Statesman was a hypocrite. However that may be, the people of Boise trampled the Statesman in the gutter, and the people of Pocatello are not very different from the people of Boise.

All the same you’re dead, dead, dead,
The fool killer has knocked you on the head;
He has got you though you fled, fled, fled,
And you can’t escape the wrath to come.

I think I hear you say you didn’t do it, you were out of the city, and the city council took advantage of your absence. Well, did you ever? My dear sir, if you were not so righteous a sport I would believe you had a hand in it. Mark you now, how the time of your departure before the orgy began, and the

time of your return, after its close, is against you. Honest now, didn't you discuss the fair before *the fair* before you left? Ever had a talk with Watson about it? You presided at the council meeting when permission was given to hold a fair. What have you to say to that?

“Was it for this you took your sudden journey,
Under pretense of business indispensable?”

You have mistaken the Water Company, as you have mistaken the committee, your selection of which was dictated by just two things: (1) Hostility to myself; and (2) friendship for you, with a desire, if you could, to select a committee that would unite both qualifications in one. And yet I venture to guess that there is not a man on that committee who has not seen through your folly, and estimated you at your true worth. You can't compound with the Water Company. That is another story and your “Honky Tonk” experience won't aid you. The owner of the waterworks has spent much treasure in creating and improving the plant until it has become of more value to this city than your pin-shop. Neither you [337] nor the pin-shop would be missed—the waterworks would. The waterworks is here to stay; you are a one-timer. It stayed here when you fled, and was here still when you returned. The cowardly tactics which you adopted in your dealings with the “Honky Tonks” and gambling will avail you nothing with the Water Company. Its hands are clean. It is to its interest to give the best it can to the people, and it cares no more for your spectacular folly than for the idle wind, whether

you work openly or take shelter behind a committee.

By the way, why did you insist on having myself and stenographer excluded from the committee meeting? Why did you hold a Star Chamber proceeding? What business had you there at all? Were you a member of the committee, and did you appoint yourself? Why did you want to work behind closed doors? What kind of a game are you up to anyway? When you once told me that you thought you had authority to make this a dry town, I didn't think you were in earnest; but you have come mighty near making it high and dry and dead as you are.

Please don't bite yourself, if you can help it.

If good advice be not lost upon you, hear instruction and be wise:

When your Honor gives advice to your customers in the future you make it plain to them that you speak as a dry-goods clerk, and not as the Water Company. For instance: When Mrs. Gabbe tells you that her lawn is "faded and gone," tell her that you don't keep it, but you have something just as good; that you have some very fine imported lawns which you are selling at the ruinously reduced price of 12½ cents a year. When Mrs. Tattle deplores her trees, all "naked and bare," tell you are just out of them, but you have some stylish shoe-trees and glove-trees which you are selling below cost and which are just as good. When the Misses Giggle complain that their water is off tell them that this is a dry [338] town, that you are in the dry-goods business, and to go and "see Alice," or the City Physician, which is just as good. Just one more bit of advice, and this is the most important of all: When a business man

or a taxpayer talks to you about the city's affairs, (for there are men in this little city and a goodly number of them business men and taxpayers too, though your Honor in your devotion to the Misses Gabbe, et al, has overlooked that fact), mark well what he says to you, and profit by it if you can. He may have staked more on the city than you have; he may be more deeply interested in its welfare, and he may know more about its needs than the Gabbeses, Tattleses, Giggleses and yourself together.

Yours truly,

.....

APPENDIX.

July 20, 1905.

From the Superintendent of the Pocatello Water Company, to the Committee Appointed by the Mayor to Secure Improved Water Service, etc.
Gentlemen:

In reply to your questions of the 18th inst., I respectfully submit the following answers. Stress of work has prevented me from replying earlier. For your convenience I rewrite the questions, with the answers appended:

Question 1: Is there any reason why the water now going to waste below the dam at Mink Creek is not brought to the city?

Answer: Yes.

Question: And if so, will it be brought to the city in the near future?

Answer: Yes.

Question 2: Will there be brought to this city a

larger supply of water during the present irrigation season? [339]

Answer: That is doubtful, but I hope yes. The Water Company is doing all that men and money can do to provide the citizens of Pocatello with a sufficient supply of the best water obtainable in the country and it has confidence that it will succeed, and if the life of the present owner be spared, the Water Company will carry to successful completion the work which it has mapped out for this city.

Question 3: What benefit will the individual water consumer in this city receive from the new reservoir, and when?

Answer: The new reservoir will give the benefit of a higher pressure than heretofore, immediately, and a better distribution as soon as the new main is put in. Every effort is being made to get the new reservoir into service. That it has not been in service two months ago is due to the late illness of Mr. James A. Murray, the owner of the water system. I have hopes to have it in service in about ten days. Some days before it is turned on, the city will be notified through the newspapers that at a certain hour, on a certain day, increased pressure will be turned into the water system. This notice will be published as soon as the Water Company can definitely fix the time.

Question 4: Can those sections of our city not now supplied with water, and which are built up sufficiently to entitle them to such, expect the same reasonably soon?

Answer: Yes. Besides the illness of Mr. Murray,

some other circumstances have impeded the Water Company in its work, but their publication would serve no good purpose.

Request by the Committee: "Each member of this committee would like to test the quantity of water you propose to supply, through a meter, and would like to test it from July 20th to August 20th, if the Water Company would allow us to do so without expense to ourselves."

(Signed) D. W. CHURCH,
Chairman." [340]

Answer to Request for Meters: In reply to the yearnings of each member of your committee to test water meters in July and August, free of charge to yourselves, I respectfully submit that every customer in the city would be delighted to test meters at the same price. The Water Company cannot discriminate between its patrons like that at all, but will be glad to accord you the same consideration and terms as other consumers.

I sincerely hope that the above will satisfactorily answer your questions, and assist your honorable body to accomplish its purpose. I fully realize the delicacy of your position, and feel that while many of you are my personal friends, a disagreeable duty towards myself and the Water Company has been thrust upon you.

Yours truly,
POCATELLO WATER COMPANY,
By GEORGE WINTER,
Superintendent.

APPENDIX NO. 2.

PROCLAMATION BY THE MAYOR

WHEREAS, THE CITY COUNCIL of Salt Lake City has, by resolution, instructed the Mayor to issue a proclamation limiting the sprinkling of lawns, yards, etc., in the district known as the "Upper District," to each Friday and Tuesday, between the hours of 7 P. M. and 10 P. M., and in the district **known** as the "Lower District," to each Friday and Tuesday, between the hours of 5 P. M. and 7 P. M.:
now

THEREFORE, I, Richard P. Morris, Mayor of Salt Lake City, Utah, do hereby proclaim and make known that all persons residing in the Upper Sprinkling District are permitted to sprinkle their lawns and yards in the "Upper District" each Friday and Tuesday, between the hours of 7 P. M. and 10 P. M. only, [341] and persons residing in the "Lower District" are permitted to sprinkle their lawns and yards each Friday and Tuesday, between the hours of 5 P. M. and 7 P. M. only.

And person violating any of the provisions of this proclamation shall, upon conviction thereof, be fined in any sum, not exceeding \$10 for the first offense, and not exceeding \$20 for each subsequent offense, as provided in Section 802, Chapter 58, Revised Ordinances of Salt Lake City, 1903.

Dated this 15th of August, 1905.

RICHARD P. MORRIS,

Mayor. [342]

Complainant's Exhibit No. 14 [Letter, Dated August 2, 1911, George E. Hyde, M. D., President Idaho State Board of Health, etc., and James H. Wallis, Idaho State Food and Sanitary Inspector to Mayor and City Council of Pocatello, Idaho.]

Pocatello, Idaho, August 2nd, 1911.

To the Mayor and City Council of Pocatello, Idaho:
Gentlemen:—

At your urgent request to make an official inspection of the system of waterworks supplying Pocatello with water, we arrived here this morning, and have made a complete investigation into all matters pertaining to the conditions surrounding your water supply.

In company with Mayor Bistline, and other city officials, we visited each of the three reservoirs, taking samples of the water at different important points; commencing with the upper intake to where the water leaves the lower reservoir, as well as from three different faucets in the city. These will be expressed to the State Chemist at Boise, and analyses sent you as soon as they are worked out in the laboratory.

From the inspection made, we are unanimous in our opinion, that when the reservoirs are thoroughly cleaned and filled so as to have the sedimentation properly cared for, the system then is highly efficient and could hardly be improved upon. The construction of the reservoirs affords every facility for speedy and effective cleaning.

We found each of the two lower reservoirs with not to exceed three inches of water, while the upper one was dry with the exception of a flow from the intake to the outlet. This condition absolutely destroys the very object for which these reservoirs were constructed, viz., to arrest the flow of water for proper sedimentation and storage capacity. In addition to this we find the basins have not been cleaned out for nearly two years at least this is true of the upper one. As a result, the flow of the water through this accumulated sediment disturbs the same and carries it along through the pipes and necessarily is distributed [343] to the people to the danger of their health.

We also find that the water is not properly screened at the final outlet to the reservoirs, which easily permits fish and other objectionable material to enter the water mains when decomposition takes place and contaminates the water.

The purity of the water depends upon the proper working of the reservoirs, especially the middle reservoir, which, when filled allows the sediment to settle and only the clear overflow to be conveyed to the lower reservoir.

In view of these facts, we have concluded to make the following recommendations:

First: That a certain amount of time each night be allowed each night to permit of the gradual accumulation of water in the middle and lower reservoirs, until the water can rise high enough in the middle reservoir to flow into the overflow pipe into the lower reservoir. That this may be done, we will

have a notice published in the paper tomorrow, to all water users that the water will be shut off from 9 P. M. to 4 A. M.

Second: That the two lower reservoirs be cleaned out and we understand this can be done in about three hours as soon as the water is shut off.

Third: That the defective screen be immediately repaired so that it would be impossible for any material to enter the mains.

Fourth: That the upper reservoir be cleaned out when an adequate amount of storage in the other reservoirs will permit.

We have been in conference with Mr. Winter, the Superintendent of the Pocatello Water Co., and informed him of our conclusions as to what the State will exact, and he has agreed to comply with the above recommendations, and will complete the cleansing, screening and filling of the two lower reservoirs within the next six days, the upper one to be subsequently cleansed and filled. [344]

Respectfully submitted,

GEO. E. HYDE, M. D.,

Pres. Idaho State Board of Health.

JAMES H. WALLIS,

Idaho State Food and Sanitary Inspector.

[Endorsed]: "Complainant's Exhibit No. 14. Filed April 26, 1913. A. L. Richardson, Clerk."

[345]

**Complainant's Exhibit No. 15 [Excerpt from
Pocatello "Tribune" of September 7, 1910].**

**EXCERPT FROM POCATELLO "TRIBUNE" OF
SEPTEMBER 7, 1910.**

A full council was present at last night's adjourned meeting with the single exception of Alderman Bohlscheid. After the disposal of routine business, the ever-present water question came up for discussion. It started when Alderman Bistline requested that the bill of the water company of \$276.75 for the rent of 54 fire hydrants during the month of August be laid to one side. Later the bill was taken up and on motion of Mr. Bistline was referred back to the water company "for correction." Mr. Bistline insisted that it was a charge for service which had never been rendered the city. He called attention to the fact that the cement contractors have always held strictly to the terms of their contract, and that in more than one instance bills have been cut down. Mr. Valentine agreed that the charge was not a proper one, and suggested that the council notify the water company to deduct 10 hours a day from the bill. Water, he said, had been shut off every night for ten hours, and neither the city nor the people of the city had the use of it. Mr. Garbett also considered the bill exorbitant. The vote on a motion to refer was unanimous.

Conference With Winter.

Chairman Higson of the fire and water committee, which was instructed at the last regular meeting

to confer with Superintendent Winter of the water company and determine definitely what the company intended to do in the matter of bringing in more water reported that himself and Alderman Peterson had waited on Captain Winter, who declined to discuss the matter with the committee, giving as a reason that he deemed it discourteous to Mr. Murray, owner of the water system, for him to make promises to the council. [346]

At this juncture, N. P. Nielson, spokesman for a committee of citizens, presented a lengthy petition, signed by 365 taxpayers, of which the following was the preamble:

WATER PETITION.

“To the Honorable Mayor and City Council of the City of Pocatello, Idaho:

“We the undersigned citizens of Pocatello, Idaho, believe that the act of Congress of September 1, 1888, granting to the people of Pocatello the right to waters from the Fort Hall reservation, in common with the Indians, and under which negotiations were made with the Indians for the waters of Mink and Gibson Jack Creeks, were for the people of Pocatello, and not for the individual members of the Pocatello Water Company.

“We object to paying for service for water, both public and private, where that service is rendered in an indifferent manner.

“We object to the city tolerating with hiring and policing of the city with men by the Pocatello Water Company.

“We object to the city tolerating a condition

whereby the superintendent of the Pocatello Water Company acts as lawmaker, judge and jury, in making rules, imposing fines, taking evidence, and meting out punishment."

"We hold that the mayor and city council are the authorized representatives of the people and we as citizens of Pocatello protest against the dilatory manner in which the mayor and city council have dealt with the question, and demand that steps be taken to guard against the recurrence of the intolerable conditions which have existed in Pocatello during the dry season of this year."

Advises Arbitration.

Following a reading of the petition by City Clerk Molinelli, Mayor Church reviewed the present council's acts with [347] reference to the water question, pointing out that all through the rather trying times this summer, he and his colleagues had been faithfully endeavoring to bring about through peaceful negotiations exactly what the petition asked for. The mayor agreed that the conditions were serious, and felt that the water company must bring in more water.

Murray the Man.

The mayor felt, however, that a better way to bring about an improvement in conditions would be for the city council to await the arrival in Pocatello of Mr. Murray and the holding of a friendly conference with him. Mayor Church felt sure that Mr. Murray would do the right thing by the people. Replacement of the pipe-line from the supply source to the reservoirs the mayor felt was imperatively

necessary, but he had been told by contractors that nothing along this line could be done until next spring. The mayor advised his colleagues to vote down the resolution, so that the council might be left with free hands to deal with the problem through the medium of peaceful negotiations rather than by appeal to the courts and the consequent plunging of the city into the expense of long-drawn-out litigation.

Unfulfilled Promises.

Mr. Nielson addressed the council, calling attention to the fact that the water company had for years been promising to improve its service by bringing in more water, but that nothing had been done. He felt that the time is now ripe for vigorous steps to the end that all danger be obviated of a recurrence of the same intolerable conditions next year and for years to come.

Mr. Valentine felt that something should be done to insist upon the city's rights and was sure that the water company would do nothing until forced.

Warning to Company. [348]

Mr. Bistline then offered his resolution, prefacing its introduction by reading an excerpt from the original water franchise ordinance, wherein a provision occurs to the effect that whenever the water company fails to deliver to the people of Pocatello an adequate supply of water, the council may, after due and reasonable notice, declare the franchise null and void. Mr. Bistline's resolution follows:

Text of Resolution.

“Whereas, the City of Pocatello did on the 4th day

of June, 1892, grant to the Pocatello Water Company a franchise to construct and operate a complete water system for the purpose of supplying the City of Pocatello with a sufficient supply of pure water, and

“Whereas, said ordinance and franchise requires that in case of failure of the Pocatello Water Company to comply with the terms of said franchise, the City of Pocatello should give a due and reasonable notice to said Pocatello Water Company, and in the event of a continued failure to comply with said ordinance, the said City of Pocatello retained the right to declare said franchise null and void.

Now, therefore, *be resolved* by the mayor and city council of the City of Pocatello.

1. That the Pocatello Water Company has failed to comply with the terms and conditions of said ordinance and franchise.

2. That six months is a reasonable time within which such changes and additions as may be required to the present system in order to comply with said franchise.

3. That the mayor and city council of the City of Pocatello hereby give notice to the Pocatello Water Company to make such needed changes and additions on or before the 1st day of April, 1911, in default of which said franchise shall be declared [349] null and void.”

Municipal Ownership.

Rev. Mr. Lawrence addressed the council to recite the experiences of the City of Santa Cruz, Cal., where he resided for some time. The council of that city undertook to purchase the privately owned water

system, but the company raised the price at the last moment and the deal was defeated. The city thereupon voted \$200,000 worth of bonds, constructed a municipal system, and in five years water rates had been reduced from \$1.50 per month to 50 cents per month, and the revenue was sufficient to pay all running expenses, costs of improvements and betterment, pay interest on the bonds and create a sinking fund. He believed that Pocatello could duplicate this record, and threw out the suggestion that the time is ripe for action.

Mayor Church stated that he was an ardent advocate of municipal ownership, but maintained that it is a condition and not a theory which confronts the city at this time. However, he pledged himself to work for municipal ownership if it is found that the water company refuses to do the right thing by Pocatello.

A Vote on the Resolution was Unanimous.

Wants a Commission.

Encouraged by his success in securing the adoption of this resolution Alderman Bistline felt like "giving them the other barrel," and moved that the council appoint two members of a commission to readjust rates and notify the water company of its action, so that the company could name its two commissioners under the provisions of the Idaho Statute. Mr. Bistline maintained that rates are too high in Pocatello. He recited the unsuccessful attempt of a preceding council to form a commission, being defeated by inability to get legal service on the water company. The law provides that following the ap-

pointment of two members of a commission by the council, the water company must, within 30 days, [350] name its two commissioners, and failure to do so subjects the company to a penalty of \$100 per day. Mr. Bistline believes that the water company owes the city something like \$100,000, and he wanted the legal aspect of the proposition looked into.

To Employ Counsel.

A majority of the council opposed Mr. Bistline's commission plan at this time, and the motion was afterward withdrawn, Alderman Valentine moving as a substitute that the council instruct the water committee to determine what it would cost to employ special counsel to look into the law and represent the city in all water suits. The motion carried by unanimous vote.

New Fire Plug.

The fire and water committee reported favorably on the location of a new fire hydrant at the corner of North Grant and Sublette street; also favored the moving of one of the hydrants near the court house block to the corner of North Seventh and Landor streets. This would mean an extension of the Clark street main one block, but if the water company refused to do this, then the committee recommended the location of the hydrant at Sixth and Landor.

For Hall Ditch.

City Engineer Sams reported that he had completed a survey for an extension through the east side of town of the Fort Hall Ditch and that it would require the moving of about 12,000 cubic yards of

dirt. This would cost in the neighborhood of \$2,500. On motion the city clerk was instructed to advertise for bids for constructing this ditch according to plans and specifications in the office of the city engineer, the bids to be opened at the next regular meeting of the council on September 15.

[Endorsed]: "Complainant's Exhibit No. 15. Filed April 26, 1913. A. L. Richardson, Clerk."

[351]

Complainant's Exhibit No. 23 [Amended Rules of Pocatello Water Co. Governing the Use of Water].

AMENDED RULES GOVERNING THE USE OF WATER.

Patrons of the Pocatello Water Co. are respectfully notified that owing to the unreasonable waste of water by some of the patrons of this company it has become necessary to promulgate rules for the benefit and guidance of all.

1. All patrons on two inch mains and in that portion of the city lying north of the center line of Sublett street (G. St. North) will be known as District No. 1.

That portion of the city lying between the center line of Sublett St. and the center line of Clark St. (A St. North) will be known as District No. 2.

That portion of the city lying south of the center line of Clark St. will be known as District No. 3.

2. District No. 1 may sprinkle from 4 to 5:30 p. m. daily and at no other time.

3. District No. 2 may sprinkle on Monday,

Wednesday and Friday evenings from 5:30 to 8:30 and on Sunday mornings from 8 to 11 and at no other time.

4. District No. 3 may sprinkle on Sunday, Tuesday, Thursday and Saturday evenings from 5:30 to 8:30 and at no other time.

5. Patrons with one lot may sprinkle for the first hour and a half after the time for sprinkling begins in their district and at no other time. Patrons with two or more lots may sprinkle during the full period allowed for their district but at no other time.

6. Patrons are requested to disconnect all sprinkling hoses from taps and hydrants at hours when sprinkling is not permitted so that the Water Co.'s inspectors may be able to see whether [352] the sprinkling rules are being violated without entering private premises.

7. Patrons are respectfully requested to keep their hydrants, taps and plumbing in good order. No leaks will be overlooked or permitted. The Water Company's inspector shall inspect the plumbing and shut off the water from any house or premises having leaks of any kind until they are properly repaired. No water will be permitted to waste from any premises into the street or to waste at all under any conditions whatever.

8. Any violation of these rules will render the violator liable to have his supply of water shut off and to be fined or to have his water service metered at the option of the Pocatello Water Co. For shutting off the penalty will be a fine of \$1.00 for the first violation; \$2.00 for the second and \$5.00 for

the third and each succeeding violation or neglect of these rules. Should the company elect to meter any premises the meter rates will be the same as the present flat rates for a quantity of water not to exceed 20,000 gallons per month for one family and one lot lawn. Quantities in excess of this amount will be charged for at the rate of 25 cents per thousand gallons, provided always that no rate shall be less than the rate which now obtains. Metered premises may use water for sprinkling or other purposes at any time during the day or night and at the option of the Water Company meters may be furnished to patrons upon application on the proper form at the Pocatello Water Company's office.

9. Patrons are respectfully cautioned not to assume that the quantity of water permitted under the above rules is only just enough for their uses. It is far in excess of their needs and is permitted only because the Pocatello Water Co. can afford more than enough to all its patrons when the present and extravagant and wasteful use of water is abated. [353]

Patrons are further respectfully reminded that some years ago it became necessary to shut off the water during the night time to stop water stealing, and, should these rules prove ineffectual it may become necessary to do it again this year.

These rules will be in force after date of publication until further notice and all rules in conflict herewith are hereby rescinded.

Dated at Pocatello, Idaho, this 29th day of June, 1905.

POCATELLO WATER CO.,

By GEO. WINTER,

Supt.

[Endorsed]: "Complainant's Exhibit No. 23. Filed April 26, 1913. A. L. Richardson, Clerk." [354]

Defendant's Exhibit No. 2 [Letter, Dated July 29, 1911, City Engineer to Fire and Water Committee of City Council of Pocatello, Idaho].

Pocatello, Idaho, July 29, 1911.

Fire & Water Committee of the City Council,
c/o Mr. H. W. Doty,
City.

Dear Sir:—

In reference to the inspection of the works of the Pocatello Water Co. which was made by the Mayor, five councilmen and the City Engineer yesterday, a summary of the conditions which we found is about as follows:

At the Mink Creek intake of the pipe-line of the Water Co. the valve house was closed and securely locked so that it was not possible to examine the amount of water entering the pipe-line and whether the valves were entirely open but we suppose that at this time of the year that would be so. There is, however, a considerable amount of water going to waste over the weir in Mink Creek at the intake and measurements taken indicate that the amount of such waste is practically three cubic feet per second or 150

miner's inches according to the Idaho rule.

From Mink Creek the party went to Gibson Jack intake without, however, going over the pipe-line between the two points except at such places where it was close to the road, where some leakage was apparent although no very large or serious leaks were found at these spots. At Gibson Jack Creek it was possible to measure the water which is delivered from Mink Creek and we found that there was about $4/10$ of a cubic foot per second flowing into the Gibson Jack intake pool from Mink Creek. This would amount to about 20" of water. There was no head on this pipe-line at that place and the water was running in much as it would from an open ditch. The intake at Gibson Jack was in good condition and all the water from that stream was being taken into the pipe-line of [355] the Water Co. so that there was no waste over the weir at that point.

From Gibson Jack the party drove to the reservoirs on the bench above the city and measurements taken there indicated that the total flow from all sources, including Cusick Creek, into the reservoirs of the Water Co. was between four and five cubic feet per second, or say over 250 miner's inches. The reservoirs themselves were practically dry. In the evening when the sprinkling is the heaviest in the city the water would run directly from the intake pipe into the outlet pipe, while in the morning after the small use during the latter part of the night there would be some water over the bottom of the reservoirs, and this rise and fall of the surface of the water in the reservoirs has stirred up the mud in the bottom

of them which accounts for the muddy condition of the City water at times lately. Quite a little mud has collected in the upper reservoir but in as much as this water comes from mountain streams whose banks are not inhabited there is probably no danger from disease on account of the mud; it is probably nothing but silt from the creeks.

You can thus see that at the present time the total available water supply of this city is not over five cubic feet per second. Maps of the city indicate that there are about 191 blocks now served by the Water Company's pipes. Probably 70% of these blocks are settled and have lawns, and in such cases probably half the lots are covered by grass and trees which have to be irrigated. This would amount to 120 acres on which you must figure that a certain amount of irrigation has got to be practiced to keep alive the trees and grass. If you allow 70 acres per cubic foot for the duty of water in Idaho, as has sometimes been taken for a basis of calculation by irrigation engineers, it will take 1.9 cu. ft. per second for such ordinary irrigation as would be necessary to keep the lawns and trees alive without waste. [356] On the basis of 10,000 people living here and 100 gals. per capita for household use, there will be consumed 1.6 cubic feet additional per second for that purpose and street sprinkling probably consumes 120,000 gals. per day or $\frac{2}{10}$ of a cubic foot per second making a total necessary consumption at the present time of 3.7 cu. ft. per second. In addition to this you can notice numerous cases in the city where a good deal of waste is going on; the water is being allowed to run for

long periods forming mudholes along the streets and in the adjoining lots, consequently it is apparent that the entire supply available for the city is being all consumed at the present time so that there is no chance for the reservoirs to fill up. This is not the driest period of the year, which usually occurs late in August or in September. The amount of water then flowing in the creeks will be considerably less than the present time, and the danger of losing the lawns and trees in town and of financial loss if a heavy fire should start, is great. Under such conditions it might be proper for the City Engineer to make some recommendations, and I would therefore suggest for your consideration the following points:

The people should be urged to use the greatest care possible in their household use, not allowing faucets to run needlessly. The hours of sprinkling should be regulated. Four hours per day; two in the morning and two at night would be sufficient to keep the lawns and trees alive through the next two months, but if the supply of water becomes still lower, as we can reasonably expect, then you will probably have to practice rotation in the lawn sprinkling, letting each ward use the water at certain fixed hours in the day. It is also desirable that early action be taken in this matter as the reservoirs above town should be allowed to fill up so as to provide ample supply in case of a heavy conflagration and also to act as settling basins for the water. [357]

The growth of the city which promises to be constant and heavy for some time, makes it necessary to increase the water supply. If the entire available

supply of Mink Creek and Gibson Jack Creek is utilized it would furnish a fine supply for household use for a city of 25,000 people but that will not furnish a supply for a lawn irrigation during the three dry months of July, August and September for very many more years. It will be necessary to soon provide other sources for lawn irrigation. This will open up a good many questions both of engineering and finance but it would be desirable for the Council to consider it at their earliest convenience.

Very truly yours,

J. P. CONGDON,

City Engineer.

JPC—A.

CC—Mr. J. M. BISTLINE, Mayor.

Mr. W. E. MOORE.

Fire and Water Committee:

HORACE WELLS, DOTY,

FRED WEIDEMAN.

[Endorsed]: "No. 147. Defendant's Exhibit No. 2. Filed April 26, 1913. A. L. Richardson, Clerk."
[358]

**Defendant's Exhibit No. 54 [Notice to Water Users
of Pocatello Water Co., Dated July 8, 1911].**

NOTICE TO WATER USERS.

WHEREAS, Certain patrons and water users of the Pocatello Water Company persist in wasting the water delivered to them by said company, by permitting such water to run from their premises, into the streets, alleys and other places, and by using leaky and defective fixtures, so that such water runs into

sewers and cesspools, accommodating such premises; and,

WHEREAS, Such waste of water has heretofore necessitated the making and enforcing of rules restricting the use of such water for sprinkling purposes, and limiting the hours when such water might be used; and,

WHEREAS, The restrictions heretofore, at times, placed upon the use of water for lawn sprinkling purposes, and limiting the hours when such water could be used for said purpose, and the efforts of the Pocatello Water Company to prevent the waste of its water, have proven to be unsatisfactory and inefficient for the purpose intended, as well as a source of constant annoyance to the Pocatello Water Company and its patrons:

NOW THEREFORE, In order to prevent such waste of the waters of the said Water Company, and for the purpose of avoiding the necessity of limiting the hours of sprinkling lawns, and for the better and more efficient service of said Water Company, the following rules are hereby adopted by the said Pocatello Water Company, during the months of July and August and will be enforced by the said Company, to wit:

RULE I.

That whenever persons receiving water from the Pocatello Water Company shall suffer or permit such water to flow from the premises occupied by them, into the streets, alleys or vacant lots, or upon the premises occupied or owned by any other person; or when such person or persons so taking water shall

permit the [359] same to flow into cesspools, sewers or other excavations, or to form pools, ponds or lakes on their own or other premises, or shall in any other manner permit the water of said Water Company to waste, or shall use the water of said Water Company for any other purpose than that covered by their application and rate; it shall be optional with said Water Company to install a water meter for the purpose of measuring all waters so delivered to such person or persons, and after delivering to such person or persons an amount of water amply sufficient for all reasonable purposes mentioned in the application under which such person or persons are taking such water, at the flat rate prescribed by Ordinance No. 86 of the City of Pocatello, any excess of such water used by such person or persons above said reasonable amount, shall be paid for at the following meter rates, to wit:

**EXCESS ABOVE REASONABLE AMOUNT—
RATE PER THOUSAND GALLONS.**

Up to 10,000 gallons.....	\$0.50
Over 10,000 gallons and up to 20,000 gallons...	1.00
Over 20,000 gallons.....	2.00

RULE II.

The water rents payable under Rule I are due at the end of each current month, and when due, are payable on demand, and any person or persons failing to pay water rent when due, on demand, during the time when they shall use such water, including the amount due in excess of the reasonable amount so furnished under flat rate, as aforesaid, as shown by meter measurement, shall be denied the use of

water from the water system of the Pocatello Water Company until such rent in arrears shall have been paid; and upon his or their failure so to pay said rent, as aforesaid, the water service of such person or persons, at the option of the Pocatello Water Company, may be cut off absolutely until such payment is made. [360]

RULE III.

Whenever it shall become necessary to cut off the water supply of any patron of the Pocatello Water Company on account of his failure to pay water rent, as provided in Rule II hereof, before such water shall be turned on and again delivered, the person or persons whose water may have been turned off, and who require the same to be turned on again, shall be required to pay to the Pocatello Water Company, the sum of One Dollar as the costs of turning off and turning on such water.

POCATELLO WATER COMPANY,

By GEO. WINTER, Supt.

July 8, 1911.

[Endorsed]: "Defendant's Exhibit No. 54. Filed April 26, 1913. A. L. Richardson, Clerk." [361]

Defendant's Exhibit No. 55 [Notice to Patrons of Pocatello Water Co., Dated July 26, 1912].

NOTICE TO PATRONS OF THE POCATELLO WATER COMPANY.

The following rules are adopted in order to prevent the extravagant waste of water by some of the residents of Pocatello to the detriment of others whose rights are aequally entitled to consideration:

Rule I is adopted, with modifications to fit condi-

tions, from Rule 10 of the Rules and Regulations adopted October 20, 1911, by the city council of the City of Spokane for the government of its municipally owned water plant.

The city council of Spokane states concerning its rules:

“Every rule is based upon the desire of the city government to furnish an abundant supply of pure and cold water for every legitimate purpose, to every citizen at the lowest price.”

In its water code the City of Spokane calls attention to the following recommendations concerning sprinkling of lawns:

A prominent landscape gardener, of considerable authority, is quoted as follows:

“The most beneficial sprinkling of lawns is that done after sundown, when the rate of evaporation from the surface is decreasing, because then the grass, shrubs, trees and earth get nearly all the water, and the volume which is most effective and productive of the best results is that which approaches a gentle shower in its nature; and when the total amount thrown upon the lawn does not exceed more than one-quarter of an inch deep. If this amount be applied twice each week, or better still, be spread in a shower aggregating one-eighth of inch in depth four times each week, it will be more than ample to keep the average lawn in the best condition, especially if it be properly mowed and rolled.

“A lawn sprinkled during the heat of the day is but [362] slightly improved, because the increasing heat of the sun promotes rapid evaporation to

its detriment, and causes waste of the water and of the time expended in sprinkling. Where water is allowed to run for a long time upon the lawn in one spot, it naturally tends to soften the earth and cause it to become boggy and rough, and it causes grass to become coarse and uneven."

This use of water—that is, too much in one spot—reacts and defeats the consumer's wishes.

RULES OF THE POCATELLO WATER COMPANY.

Rule 1. No consumer from the mains of the Pocatello Water Company, using water by and under the flat rates set forth in Ordinance No. 86 of the City of Pocatello, shall use the same for lawn sprinkling or hosing except as follows: The hose through which the water is supplied must be held in the hands of the operator while the sprinkling or hosing is being done. The hose must be equipped with a nozzle having a single outlet aperture not greater than one-fourth inch in diameter, or if more than one outlet is used the combined cross section of all the apertures must not exceed one-fourth inch. No hosing or sprinkling shall be done except between the hours of 6 A. M. and 8:30 P. M. and at all time other than sprinkling hours the hose through which the sprinkling is done must be disconnected from the faucet, hydrant or other outlet supplying water from the Water Company's mains.

Rule 2. No person or persons receiving water from the Pocatello Water Company shall suffer or permit such water to flow from the premises occupied by them, into the streets, alleys or vacant lots or upon

the premises occupied or owned by any other person; nor shall such person or persons so taking water permit the same to flow into cesspools, sewers or other excavations or to form pools, ponds or lakes on their own or other premises; nor shall they in any other manner permit the water of said Water Company [363] to waste nor shall they use the water of said Water Company for any other purpose than that covered by their respective applications and rates.

Rule 3. Any person desiring to use water from the mains of the Pocatello Water Company for purposes other than those specified in the schedule of rates contained in said Ordinance 86 may secure full information concerning the rates and terms for such use, upon application to the office of said Water Company.

Rule 4. In case of the violation of Rules 1 and 2 or either of them, the Water Company will, if its service requires, shut off the said water supply of any person so violating said rules and before the same will be turned on to the premises of such violator he will be required to pay the Pocatello Water Company the sum of one dollar as the costs of turning off and turning on said water supply.

The great quantity of water used for settling sewers make these rules immediately necessary. They will be in force from and after their publication until further notice, and all rules in conflict herewith are hereby rescinded.

POCATELLO WATER COMPANY,

By GEO. WINTER, Supt.

Dated at Pocatello, Idaho, this 26th day of July, 1912.

[Endorsed]: "Defendant's Exhibit No. 55. Filed April 26, 1913. A. L. Richardson, Clerk."

Filed Oct. 13, 1913. A. L. Richardson, Clerk.

[364]

[Order Settling and Approving Statement of Evidence, etc.]

The above and foregoing statement of the evidence on appeal having been presented to me for settlement and it appearing to me that the same is true, complete and properly prepared; and it further appearing to me that the solicitors for plaintiff were duly notified of the lodgment of such statement and have waived all objections thereto and have consented to the allowance of the same:

The said statement is, therefore, approved this 27th day of October, 1913.

FRANK S. DIETRICH,
United States District Judge,
District of Idaho.

Refiled Oct. 27, 1913. A. L. Richardson, Clerk.

[365]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

No. 147.

CITY OF POCA TELLO, a Municipal Corporation,
Complainant,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY, and GEORGE WINTER,
Defendants.

Notice of Lodgment of Statement on Appeal.

To the Above-named Complainant and to W. H.
Witty, City Attorney, P. C. O'Malley, and D.
Worth Clark, Solicitors for Complainant:

You will please take notice that the defendant
above-named, by his solicitors, has this day lodged
in the office of the Clerk of said court for the exam-
ination of the plaintiff and its solicitors a statement
of the evidence to be included in the record on ap-
peal in said cause to the United States Circuit Court
of Appeals for the Ninth Circuit, in accordance with
paragraph (b) of Rule 75 of the Rules of Practice
for the Courts of Equity of the United States, in
force February 1, 1913.

You are further *notice* that, on the 25th day of
October, 1913, at 10 o'clock A. M., or as soon there-
after as counsel can be heard, at Judge's Chambers
at Boise, Idaho, the defendant will ask the Judge of

said court to approve the said statement.

Dated October 13, 1913.

N. M. RUICK,

JAMES H. HAWLEY,

Solicitors for Defendant. [366]

Service of the above and foregoing notice of lodgment of statement on appeal, together with the receipt of a copy of said statement and of this notice, is hereby admitted this 14th day of October, 1913.

D. WORTH CLARK,

P. C. O'MALLEY,

Solicitors for Complainant.

[Endorsed]: Filed Oct. 27, 1913. A. L. Richardson, Clerk. [367]

*In the District Court of the United States for the
District of Idaho.*

CITY OF POCATELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCATELLO WATER
COMPANY, and GEORGE WINTER,
Defendants.

Petition for Appeal.

Filed October 27th, A. D. 1913.

To the Honorable FRANK S. DIETRICH, District
Judge.

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause

on the 26th day of May, 1913, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said record was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

N. M. RUICK,

J. H. HAWLEY,

Solicitors for Defendant,

Residence, Boise, Idaho. [368]

The foregoing petition granted and appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred Dollars.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed Oct. 27, 1913. A. L. Richardson, Clerk. [369]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCATELLO,

Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under
the Name and Style of the POCATELLO
WATER COMPANY and GEORGE
WINTER,

Defendants.

Assignment of Errors.

Come now the defendants, James A. Murray, doing business under the name and style of the Pocatello Water Company, and George Winter, by N. M. Ruick, Esquire, and James H. Hawley, Esquire, their solicitors, and say that in the records and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the Court erred in permitting, over the objection of the defendants, made while witness Thomas F. Terrell was on the stand, any evidence to be given on the part of plaintiff, because it appears in the proceedings that the plaintiff itself has repudiated the consideration upon which the equities in the bill of complaint are based, in that it has ignored the conditions of the ordinance binding the plaintiff to do certain things as a condition of the defendant Murray furnishing an additional supply of water to the City

of Pocatello and agreeing to extend the water system.

II.

The Court erred in permitting plaintiff and complainant's exhibit No. 2 to be introduced in evidence over [370] the objection of the defendants that the same was incompetent, irrelevant and immaterial, and the further grounds that it was an effort to compromise the difference between the parties.

III.

The Court erred in admitting as evidence plaintiff and complainant's exhibits Nos. 4, 5, 6, 7 and 8, on the same grounds, and for the same reasons specified as grounds of objection in subdivision II hereof.

IV.

The court erred in permitting witness Theodore Turner, over the objections of defendants, to give testimony relating to conditions prior to the enactment of Ordinance No. 86.

V.

The Court erred in admitting, over the objection of defendants, plaintiff and complainant's exhibit No. 10.

VI.

The Court erred in admitting, over the objection of defendants, the record of the City Council of Pocatello, of date September 1, 1910.

VII.

The Court erred in permitting witness, W. P. Havenor, to testify as an expert and give expert testimony in behalf of the plaintiff, objection having been made thereto by the defendants on the grounds that he had not qualified as such expert.

VIII.

The Court erred in permitting witness Fletcher C. Burrus to testify on behalf of the plaintiff and over the objections of defendants in answer to the question: [371]

“At the time you visited those reservoirs what can you say as to whether the City of Pocatello had any fire protection or not from the Pocatello Water Company’s plant?”

IX.

The Court erred in permitting over the objections of the defendants, the admission of plaintiff’s exhibit No. 15, that objection being on the grounds that the said exhibit was incompetent, irrelevant and immaterial for any purpose and that it was hearsay.

X.

The Court erred in admitting, over the objection of the defendants, plaintiff and complainant’s exhibits Nos. 14 and 15. The admission of each of said exhibits being objected to by *plaintiff* on the grounds that they were incompetent, irrelevant and immaterial and did not serve any legitimate purpose in the case.

XI.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the defendant, George Winter, while testifying on behalf of the defendants:

“You recall that there was such notice, also do you recall that it provided for the shutting off of the water at night between certain hours?”

XII.

The Court erred in permitting the following question to be asked on cross-examination of witness Alexander Murray while testifying as a witness for the defense. Said question being objected to by the defendants as not being proper cross-examination, to wit:

“Is it your judgment that four or five thousand people living in town procure water from wells?”

XIII.

The Court erred in sustaining the objection of the plaintiff to the witness W. E. Moore while on the stand giving [372] for the defendant, giving specific instances of the amount of water used in various towns by the inhabitants thereof.

XIV.

That the Court erred in entering judgment and decree herein in favor of plaintiff and against defendants, and that the said decree, made, filed and entered herein on the 26th day of May, 1913, is erroneous and against the just rights of defendants herein for the following reasons, to wit:

(a) Because the evidence showed that defendant, James A. Murray, on his part had complied with the requirements of Ordinance No. 86 of the ordinances of the City of Pocatello imposed upon him thereby and fulfilled his obligations thereunder.

(b) Because the evidence showed that at all times the defendants, James A. Murray, had furnished to the City of Pocatello and the inhabitants thereof an ample and full supply of pure and wholesome water

for all purposes mentioned in and required by said Ordinance No. 86, except when prevented from so doing by natural causes over which the defendants had no control, and by the acts of the inhabitants of said City of Pocatello and of the authorities of said city.

(c) Because the evidence is insufficient to show any violation by defendants, or either of them, of the terms of the franchise granted defendant, James A. Murray, by, through and under said Ordinance No. 86.

(d) Because the evidence was insufficient to warrant the Court in entering a decree or directing a decree to be entered cancelling, annulling or rescinding said Ordinance No. 86 of the ordinances of the City of Pocatello.

(e) Because the evidence herein did not warrant or justify a decree being entered declaring said Ordinance No. 86 invalid or void or of no effect. [373]

(f) Because the evidence does not justify a decree being entered declaring or holding that defendant, James A. Murray, had no right or power under or by virtue, or by reason of said Ordinance No. 86.

(g) Because the Court erred in its ruling upon the admission and rejection of testimony as more particularly shown in specifications of error numbered 1 to 13, inclusive, and based the decree herein upon evidence that was inadmissible and should not have been permitted to be given or to remain in the record.

(h) Because the Court directed the entry of a decree against the defendants and *complainant*.

N. M. RUICK,
JAMES H. HAWLEY,
Solicitors for Defendants,
Residence, Boise, Idaho.

[Endorsed]: Filed Oct. 27, 1913. A. L. Richardson, Clerk. [374]

*In the District Court of the United States for the
District of Idaho.*

CITY OF POCA TELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY and GEORGE WINTER,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that the National Surety Company, a corporation duly organized under the laws of the State of New York and duly qualified and authorized to do business and to become surety on bonds within the State of Idaho, acknowledges itself to be indebted to the City of Pocatello, appellee in the above cause, in the sum of \$500.00 dollars, conditioned that,

Whereas, on the 26th day of May, 1913, in the District Court of the United States for the District of Idaho, in a suit pending in that court wherein the City of Pocatello was plaintiff and James A. Mur-

ray, doing business as the Pocatello Water Company, was defendant, numbered 147 on the Equity Docket, a decree was rendered against the said James A. Murray and the said James A. Murray having obtained an appeal to the United States Circuit Court of Appeals of the Ninth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation having been directed to the said City of Pocatello citing and admonishing it to be and appear at a session [375] of the United States Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, on the day of, 19....

Now, if the said James A. Murray shall prosecute his appeal to effect and answer all costs, if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

NATIONAL SURETY COMPANY,

[Corporate Seal]

By L. W. ENSIGN,
Attorney-in-fact.

Attest:

..... Secretary.

Approved:

FRANK S. DIETRICH.

[Endorsed]: Filed Oct. 27, 1913. A. L. Richardson, Clerk. [376]

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

CITY OF POCA TELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY and GEORGE WINTER,
Defendants.

Prae ci pe to Clerk for Transcript on Appeal.

You will please incorporate the following portions
of the record in the above-entitled cause into the
transcript on the appeal in said cause to the United
States Circuit Court of Appeals, to wit:

1. Amended Bill of Complaint.
2. Separate Answer of Defendant, James A. Mur-
ray to Amended Complaint.
3. Replication.
4. Notice of Lodgment with the Clerk of State-
ment on Appeal and Admission of Service.
5. Statement of Evidence on Appeal.
6. Opinion of Court.
7. Decree.
8. Assignment of Errors.
9. Petition on Appeal.
10. Citation with Proof of Service Thereof.

In preparing the record pursuant to this prae ci pe,
please take care to avoid the inclusion of more than

one copy of the same paper pursuant to Equity Rule No. 76.

N. M. RUICK,
J. H. HAWLEY,

Solicitors for Defendant and Appellant. [377]

Please take notice that the above and foregoing praecipe indicating the portions of the record to be incorporated into the transcript on appeal in the United States Circuit Court of Appeals in the above-entitled cause will be filed with the Clerk as provided by paragraph (a) of Rule 75, Rules of Practice of Courts of Equity of the United States, in force February 1, 1913.

N. M. RUICK,
J. H. HAWLEY,

Solicitors for Defendant and Appellant.

To W. H. Witty, City Attorney, and D. Worth Clark,
Esq., Attorneys for Plaintiff and Respondent.

Service of the above and foregoing notice, together with a copy of the praecipe therein referred to, is hereby admitted this 27th day of October, 1913.

W. H. WITTY,

City Attorney.

D. WORTH CLARK,

Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Oct. 30, 1913. A. L. Richardson, Clerk. [378]

*In the District Court of the United States for the
District of Idaho.*

CITY OF POCA TELLO, a Municipal Corporation,
Plaintiff,

vs.

JAMES A. MURRAY, Doing Business Under the
Name and Style of POCA TELLO WATER
COMPANY and GEORGE WINTER,
Defendants.

Citation.

United States of America to City of Pocatello,
Greeting:

You are hereby notified that, in a certain case in equity in the United States District Court in and for the District of Idaho, wherein the City of Pocatello is complainant and James A. Murray, doing business as the Pocatello Water Company, is defendant, an appeal has been allowed the defendant herein to the United States Circuit Court of Appeals of the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at San Francisco thirty days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH,
of the United States District Court for the District
of Idaho, this the 27th day of October, A. D. 1913.

FRANK S. DIETRICH,
United States District Judge. [379]

Service of a copy of the above and foregoing citation, together with receipt of a copy thereof, hereby admitted this 27 day of October, 1913.

W. H. WITTY,
D. WORTH CLARK,
Solicitors for City of Pocatello,
Plaintiff and Appellant. [380]

[Endorsed]: No. 147. In the District Court of the United States, Ninth Judicial Circuit, District of Idaho, Southern Division. City of Pocatello, a Municipal Corporation, Plaintiff, vs. James A. Murray, Doing Business Under the Name and Style of Pocatello Water Company, and George Winter, Defendant. Citation. Filed Oct. 30, 1913. A. L. Richardson, Clerk. [381]

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

By E. B. Yarrington,
Deputy Clerk. [382]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

*In the District Court of the United States for the
District of Idaho.*

JAMES A. MURRAY, Doing Business as the
POCATELLO WATER COMPANY, and
GEORGE WINTER,

Plaintiffs in Error,

vs.

CITY OF POCATELLO, a Municipal Corporation,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 383, inclusive, to be full, true and correct copies of the Amended Bill of Complaint, Answer to Amended Bill of Complaint, Replication, Opinion, Decree, Statement of Evidence on Appeal, Notice of Lodgment of Statement on Appeal, Petition for Appeal and Order Allowing Same, Assignment of Errors, Bond on Appeal, Praecipe for Transcript, Original Citation, Return to Record and Clerk's Certificate, in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$233.80, and that the same has been paid by the appellant.

Witness my hand and seal of said court affixed at
Boise, Idaho, this 15th day of November, 1913.

[Seal]

A. L. RICHARDSON,

Clerk.

By E. B. Yarrington,

Deputy Clerk. [383]

[Endorsed]: No. 2345. United States Circuit
Court of Appeals for the Ninth Circuit. James A.
Murray, Doing Business Under the Name and Style
of The Pocatello Water Company, Appellant, vs.
The City of Pocatello, a Municipal Corporation, Ap-
pellee. Transcript of Record. Upon Appeal from
the United States District Court for the District of
Idaho, Eastern Division.

Filed November 25, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

JAMES A. MURRAY, DOING BUSINESS UNDER THE
NAME AND STYLE OF THE POCA TELLO
WATER COMPANY, APPELLANT,

vs.

THE CITY OF POCA TELLO, A MUNICIPAL CORPO-
RATION, APPELLEE.

APPELLANT'S BRIEF

STATEMENT.

This is a suit to cancel and annul ordinance No. 86 of the
City of Pocatello, entitled as follows:

"An ordinance confirming and continuing certain
privileges and franchises formerly granted to F. D.
Toms, John J. Cusick and James A. Murray, to and in
James A. Murray, the legal successor of said parties,
making a contract by the City of Pocatello with James
A. Murray, for supplying said city with water for pub-
lic and private use; fixing the rates to be charged for
said water; providing a means of ascertaining the value
of said water system, as a basis of readjusting rates in
the future, or in the event of a sale; and waiving the

right on the part of said city to build, own or acquire a competitive water system, except under stated conditions or of granting to others more favorable terms or franchises than that now held and granted to said James A. Murray.”

As appears from the title and preamble, this ordinance is supplementary to one passed by said city on January 4, 1892, which conferred upon F. D. Toms and his associates the right to construct, maintain and operate within the then town or village of Pocatello for a period of fifty years a system of water works for the purpose of supplying said town or village and the inhabitants thereof with a sufficiency of pure and healthful water; also supplementary to another ordinance of said city numbered 59, approved June 8, 1898, continuing and confirming to the Pocatello Water Company, Limited, a corporation, the then successor in interest of said Toms et al., the privileges and franchises originally given, granted and conferred by ordinance 46 upon Toms and his associates.

The ordinance sought to be set aside is set out in full as Exhibit “A” to the amended complaint (T. pp. 14 to 22), and it is with this ordinance only that this action deals—except in so far as the earlier ordinances may be referred to for the purpose of throwing light upon ordinance 86.

The ordinance in question begins with an extended preamble, wherein ordinances 46 and 59 are referred to and the privileges and franchises thereby granted continued and confirmed unto Mr. Murray who had succeeded to such privileges and franchises.

The obligation assumed by Murray, in Ordinance 86, is expressed in the preamble (T. p. 16) which reads:

“Whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future needs of said city, and said James A. Murray agrees to bring in the waters of Mink Creek,

and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money."

No further reference is made in the ordinance to this subject except, indirectly, in Sec. 6 thereof (T. p. 20), wherein it is provided:

"Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances; such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions as in virtue of an executed contract; but, if more than ninety days shall elapse without such commencement, this ordinance shall be and the same is hereby declared null and void."

The obligations assumed by the city are contained in Secs. 5 and 7 of the ordinance (T. pp. 19, 21).

These are: (a) That the city shall not thereafter grant any franchise for the construction or operation of a water system in said city on terms more favorable than those held by Murray; (b) The city shall not build, acquire, own or operate a water system of its own until it has in good faith offered to purchase the water system of the said Murray at a price to be ascertained as prescribed in the ordinance and; (c) The city to rent and pay for not less than forty-five fire hydrants at the schedule rate fixed by the ordinance.

The foregoing comprises all the obligations of either and both parties to the ordinance, unless a reference contained in Sec. 8 be construed as a new or additional obligation assumed by Murray which, however, counsel for Murray do not concede.

The provision last referred to is in this language:

“If, at any time, the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the City of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any other source directly or indirectly, without reference to the provisions of this ordinance; provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance or such further improvements as may hereafter become necessary to supply sufficient water, as aforesaid, before the provisions of this ordinance shall apply.”

The amended complaint alleges that Murray has violated the terms of the ordinance in failing to bring in the waters of Mink Creek, an obligation which, as the city contends, required Murray to bring in *all* the waters of Mink Creek, basing such contention upon the language employed in the preamble to ordinance 86, which language is hereinbefore quoted. The complaint also alleges certain wrongful acts of the defendant's agent and manager in the conduct of the business and in his dealings with the water consumers. The prayer of the bill is for an annulment of the ordinance, for the appointment of a receiver and for an injunction.

The answer of the defendant, Murray, contains a specific denial of each and every material allegation of the complaint; it also sets up the rights of said defendant under the two ordinances passed prior to the one sought to be cancelled.

The court rendered its decision, in writing, directing a decree to be entered annulling and cancelling the ordinance. The prayer for appointment of a receiver and for an injunction—not having been pressed—were ignored.

From the judgment and decree annulling the ordinance, this appeal is taken.

The issues presented are confined to ordinance 86 and to the inquiry, (1) Should the obligation assumed by Murray "to bring in the waters of Mink Creek be construed as requiring him to bring in *all* the waters of Mink Creek forthwith or such portion only as should, with the other waters available, be sufficient for the needs of said city and its inhabitants, and *as* needed. This is the only issue in the case, notwithstanding at the trial a large amount of testimony was received bearing upon other questions, particularly upon the question of the sufficiency of the water supply.

It is apparent that no question other than the one as to whether ordinance No. 86 has been violated by Murray by reason of his failure to bring in all the waters of Mink Creek is involved in this controversy, for the complaint, while it enumerates many instances of alleged misconduct of the defendant, through his manager, in the conduct of the water system, charges, as the only breach of the ordinance, the failure of Murray to bring in the waters of Mink Creek.

SPECIFICATIONS OF ERROR.

That the court erred in entering judgment and decree herein in favor of plaintiff and against defendants, and that the said decree, made, filed and entered herein on the 26th day of May, 1913, is erroneous and against the just rights of defendants herein for the following reasons, to-wit:

(a) Because the evidence showed that defendant, James A. Murray, on his part had complied with the requirements of ordinance No. 86 of the ordinances of the City of Pocatello imposed upon him thereby and fulfilled his obligations thereunder.

(b) Because the evidence showed that at all times the defendant, James A. Murray, had furnished to the City of Pocatello and the inhabitants thereof an ample and full supply of pure and wholesome water for all purposes men-

tioned in and required by said ordinance No. 86, except when prevented from so doing by natural causes over which the defendants had no control, and by the acts of the inhabitants of said City of Pocatello and of the authorities of said city.

(c) Because the evidence is insufficient to show any violation by defendants, or either of them, of the terms of the franchise granted defendant, James A. Murray, by, through and under said ordinance No. 86.

(d) Because the evidence was insufficient to warrant the court in entering a decree or directing a decree to be entered cancelling, annulling or rescinding said ordinance No. 86 of the ordinances of the City of Pocatello.

(e) Because the evidence herein did not warrant or justify a decree being entered declaring said ordinance 86 invalid or void or of no effect.

(f) Because the evidence does not justify a decree being entered declaring or holding that defendant, James A. Murray, had no right or power under or by virtue, or by reason of said ordinance No. 86.

ARGUMENT.

Confining the issues to those made by the pleadings, the consideration and decision of this case is much simplified. The first inquiry which arises is:

What provision of ordinance No. 86, or what obligation assumed by Murray thereunder, has been violated, which justifies a decree annulling this ordinance?

It is the contention of the city that, by ordinance 86, Murray obligated himself to *immediately* bring in *all* the waters of Mink Creek.

This is denied by defendant, Murray, who contends that the obligation by him assumed by virtue of ordinance 86

required him to bring in the waters of Mink Creek to the extent required, and as required, by the needs of the city and its inhabitants.

To sustain its contention, the city relies upon the language employed in the preamble to ordinance 86, hereinbefore quoted, and asserts that the quantity of water supplied by the water company to the city is and, since on or about 1905, has been insufficient to supply the city and its inhabitants.

The reply of Murray, as the Water Company, is:

1. That the language employed in ordinance 86 did not require him to immediately bring in all the waters of Mink Creek but to bring in the same as *needed and required*, in discharge of the obligations assumed under the terms of ordinance number 46, which was and is to supply water sufficient for the public and private uses and purposes of the citizens and inhabitants of Pocatello. In support of this contention, defendant says:

(a) That nothing in ordinance No. 86 contained binds Murray to supply water sufficient for the needs of the city and its inhabitants.

(b) That the recital in the preamble to ordinance 86 that the (then) present supply of water is deemed inadequate for the present and future needs of the city, was and is an assumption and not a statement of fact.

(c) That in June, 1901, when ordinance 86 was passed, the supply of water being furnished by the water company was not, in fact, inadequate, but was ample for the then present needs of said city and its inhabitants and sufficient for future needs for a reasonable period.

(d) To have immediately brought in all the waters of Mink Creek would have more than doubled the supply and would have involved an expenditure unwarranted by conditions, and involving excessive rates to consumers.

1. *The language employed in ordinance 86 did not require Murray to immediately bring in all the waters of Mink Creek but to bring in the same as needed and required, in discharge of the obligation assumed under the terms of ordinance number 46, which was and is to supply water sufficient for the public and private uses and purposes of the citizens and inhabitants of Pocatello.*

The only thing required of Murray by the terms of ordinance 86 is that he shall "bring in the waters of Mink Creek, and make all extensions of street mains warranted by the growth of said city." As we understand it, no point is attempted to be made by reason of any failure to make extensions of street mains but the ordinance is attacked upon two grounds: (1) A failure to bring in *all* the waters of Mink Creek; and (2) The insufficiency of the water supply.

The question, therefore, is as to the interpretation of the words quoted from the ordinance respecting the bringing in of the waters of Mink Creek. The city contends that this meant *all* the waters of Mink Creek; but the language used does not itself imply such obligation. "The waters" of a stream may mean all or a portion and is it not reasonable to conclude that, if it was intended that Murray should bring in *all* of the waters of Mink Creek regardless of the need for the same, it would have so stated?

In their effort to find support for the claim that Murray contracted to bring in *all* the waters of Mink Creek, it is argued that the quantity of water actually brought in from Mink Creek—varying in the estimates from .46 of a cubic foot, the estimate of the city, to .76, the estimate of the Water Company—was inconsiderable and did not in effect increase the water supply. It should be borne in mind, however, that there is a superabundance of water except for some three months in the summer time when irrigation of lawns and gardens is general; that subsequent to the pass-

age of the ordinance, the Company constructed a new reservoir of a capacity of two million gallons or more; that the increased demand during the months referred to is due to irrigation and not to household uses and that the addition of even one-half of a second foot, or 324,000 gallons per day is a substantial contribution to the water supply of a city of a population of 5,000, in which not to exceed 3,000 can be counted as users of water supplied by the Water Company.

Construction of Ordinance by Conduct of Parties.

Conceding that the phrase, "the waters of Mink Creek" is capable of more than one construction, the construction placed thereon by the parties should, we think, have great weight with the court. The construction contended for by Murray, to-wit, that he was only required to bring in the waters of Mink Creek in quantities such as should be required by the needs of the city—and when so required—is borne out by the fact that the construction by Murray of a pipe line of a capacity concededly insufficient to convey all the waters of Mink Creek went on and the construction thereof was completed with the knowledge of the city, which accepted the work as completed in accordance with the obligation assumed by Murray, when it received and rented, and, for some ten years, paid for, the forty-five fire hydrants it had agreed to rent and pay for in consideration of the improvements which Murray agreed to make and made.

By the terms of the ordinance, Murray acquired no rights except by the certain and speedy completion of the improvements which he had undertaken to make, and the fact that the city dealt with Murray for a series of years on the basis of the improvements having been made and completed should be of convincing force as to the character and extent of the obligation which Murray assumed; moreover, the city, in instituting this suit to set aside the ordinance, treated it

as valid—a solemn admission that Murray had complied with the conditions precedent to his acquiring rights and privileges thereunder.

So far as the failure to bring in all the waters of Mink Creek is sought to be made the basis of a decree annulling the ordinance, it would seem that the city, by its conduct, is estopped from denying that the terms of the contract were fulfilled or, if it be urged that estoppel cannot be pleaded in defense of a failure of a water company to furnish an adequate supply of water, which duty and obligation, it is commonly held, is inherent in the nature of the contract between the public and a water company—yet, the fact of the acquiescence by the city may be referred to as tending to show that the city regarded the bringing in of a part of the waters of Mink Creek as a compliance with the contract.

(a) *There is nothing in ordinance No. 86 which requires Murray to supply water sufficient for the needs of the city and its inhabitants.*

Such a provision is contained in original ordinance 46—but that ordinance is not sought to be set aside, neither is it charged anywhere in the complaint in this action that ordinances 46 and 59, or either of them, have been violated or broken by the defendant. If the quantity of water supplied by the Water Company was insufficient, why was not ordinance 46—the only ordinance binding Murray in this respect—attacked and sought to be cancelled? It is apparent from the complaint in this action that the default alleged is that the defendant was required by ordinance 86 to bring in all of the waters of Mink Creek, whereas, he has only brought in a portion thereof.

In the original ordinance 46, passed in 1892, the sources of supply are specified as “Mink and Gibson Jack” creeks (T. p. 50). By the terms of that ordinance, Murray’s predecessors in interest agreed that the water be conveyed from these creeks and that it should be in quantities sufficient to

supply both the public and private uses and purposes of the citizens and inhabitants of the town, then village, of Pocatello and should be of pure and healthful quality. This ordinance has been in operation since the date of its approval and acceptance and was never construed by the parties to require the bringing in of all the waters of Mink Creek in advance of a necessity therefor.

(b) *The recital in the preamble to ordinance 86 that the (then) present supply of water is deemed inadequate for the present and future needs of the city, was and is an assumption and not a statement of fact.*

(c) *In June, 1901, when ordinance 86 was passed, the supply of water being furnished by the Water Company was not, in fact, inadequate, but was ample for the then present needs of said city and its inhabitants and sufficient for future needs for a reasonable period.*

The preamble to ordinance 86 recites that "the present supply of water furnished by said water system is deemed inadequate for the present and future need of said city." This is not a declaration that the supply is, in fact, inadequate, but, as a predicate to the action about to be taken and the mutual obligations about to be assumed, it is mutually *assumed* that the supply is inadequate. It is the assumption and not the fact which furnishes the basis of the new negotiations and agreement. That the supply was not inadequate is shown by facts admitted, or established, by the city, at the trial of this case.

The present population of the City of Pocatello is assumed to be 10,000. At the time the ordinance, No. 86, was passed, it was one-half that number. The proportionate number of actual water users to the total population is shown to be as 5,250 to 10,000 or 52½ per cent. We will do better by the city than that. We will assume that 3,000 of the 5,000 population of the city in 1901—or 60 per cent—were actual patrons of the Water Company and depended on it for a water

supply. Leaving Mink Creek out of the question—as no water was derived from that source in 1901—and adopting the measurements and estimates of Mr. Ashton, Chief Engineering Expert for the city upon the trial, the least flow from Gibson Jack and Cusick Creeks, at lowest stages, was two second feet (T. pp. 134, 135). Inasmuch as Mr. Ashton, Chief Expert, was not asked by the city to estimate or compute the sufficiency of the supply and did not do so, we will take the figures of Mr. Congdon, contained in his report as City Engineer (T. pp. 414, 416). (We make use of Mr. Congdon's report for purposes of convenient illustration merely, inasmuch as it was admitted in evidence under restrictions, and as being more favorable to the city than are the computations, estimates and opinions of defendant's experts).

According to Mr. Congdon's report, the daily supply of water required for the city of Pocatello when it contained a population of 5,000 will be found by cutting his estimate for a city of 10,000 population in two, and we have:

Domestic use .....	.80 cu. ft.
Irrigation .....	.95 cu. ft.
Sprinkling streets .....	.10 cu. ft.
<hr/>	
Or a total of.....	1.85 cu. ft.

which requirement is .15 cubic feet per second less than the minimum supply as measured and computed by Mr. Ashton at the lowest stage of water in Gibson Jack and Cusick Creeks in 1911.

Murray had not failed, so far, to comply with the obligation which he assumed by the terms of ordinance No. 46, and was, therefore, at the time ordinance 86 was passed, under no present obligation to increase the supply. Yet he exhibited a willingness to do so, and ordinance No. 86 was passed and accepted by Murray. This ordinance constituted a new and supplemental agreement, having as its consideration an

assumption by Murray of a *new obligation, or the advancement in time of performance of an obligation previously assumed but not yet due.*

(d) *To have immediately brought in all the waters of Mink Creek would have more than doubled the supply and would have involved an expenditure unwarranted by conditions, and involving excessive rates to consumers.*

As testified to by witnesses for the city (T. pp. 127, 134), 3½ second feet, and upwards, of the waters of Mink Creek at its lowest stage in the summer of 1911, was being wasted over the dam at Mink Creek intake. If ordinance 86 required Murray, in 1911, to bring in all the waters of Mink Creek, it meant a supply, at the lowest stages of water in all the creeks, of approximately 6 second feet or 3,888,000 gallons per day for a city of 5,000 inhabitants—as Pocatello was at that time—or a daily per capita of 777.6 gallons to every inhabitant, regardless of whether he used water from the company's mains or not.

The minimum supply thus provided would have furnished a daily per capita of 388.8 gallons for a city of the present size of Pocatello, to-wit, 10,000 inhabitants, while, for those actually using water from the company's mains, 5,072 in number, a daily supply of 766 gallons would have been provided.

Had this question been under consideration at that time, before a court or a commission, as to what constituted reasonable service and reasonable rates, are we to believe that such an extension of service would have been ordered, or even permitted, to be immediately installed and rates fixed to cover the increased outlay?

It is reasonable, we think, to assume that the order would not have been made, by reason of the fact that conditions did not justify such an outlay or the increase of rates which would necessarily follow. It is equally reasonable to assume that the parties to this contract had in contemplation only

such extension of service as should be reasonable and adequate to the needs of the city, having in contemplation such increase in the supply as the growth of the city should make advisable or necessary.

With a provision already embodied in the ordinance, requiring Murray—as the city claims—to bring in all the waters of Mink Creek, or 3,888,000 gallons per day, why, we ask, should it have been thought necessary to refer, as in section 8 of the ordinance (T. p. 21), to a possible insufficiency in the quantity of water for the use of a city of the size and population of Pocatello? Yet those charged with protecting the city's interests seem to have had visions of insufficient water supply. Evidently, these were incited by a fear that Murray, in the application to the city's use of the waters of Mink Creek, would not keep pace with the growth and needs of the city—therefore, it was insisted that, in case of default, the city be free to obtain the needed water supply elsewhere.

Sufficiency of the Water Supply Not an Issue in This Case.

The principal ground urged by the city as a basis of a decree cancelling and annulling ordinance 86 is the insufficiency of the water supply, although no such obligation is contained in the ordinance. The ordinance in question here simply provides that, for a failure on the part of Murray to furnish an ample supply of water, the city should be privileged to obtain a supply elsewhere and the only reason for inserting this clause in the ordinance was that the city had, by that ordinance, bound itself not to become a rival of the Water Company nor construct a municipal plant, except after an offer to purchase the plant of the Water Company.

It is true that the city is not confined to the remedy prescribed by the ordinance where the remedy would be inadequate, but in the event of a breach of the ordinance under consideration, the remedy is ample and complete.

The opinion by Judge Dietrich is largely devoted to a discussion of the quantity and sufficiency of the water which the present system is capable of supplying to the city and its inhabitants, and to the alleged arbitrary and wrongful conduct of the defendant through his superintendent, Mr. Winter, in his dealings with the water consumers; but all this discussion seems to us to be aside from the real issues in the case. Whether Murray was required to bring in all the waters of Mink Creek immediately and as a condition of acquiring rights and privileges under the ordinances is the real and only question and, being the only requirement of Murray contained in ordinance 86, it is necessarily the only condition possible to be broken. Insufficiency of water supply would not, we contend, be a ground for cancelling or annulling the ordinance referred to, inasmuch as no obligation was expressly or by implication of law assumed by Murray under ordinance No. 86 to furnish an adequate supply of water. That obligation had already been expressly assumed, and, if Murray violated it, he violated the provision of ordinance 46 and not ordinance 86.

This conclusion is emphasized by the fact that the decree in this case leaves unaffected the right of the defendant, Murray, to continue to supply the city of Pocatello and its inhabitants with water and to exact compensation therefor and to occupy the streets and alleys of the city with his water mains.

On the assumption that the sufficiency of the water supply is in issue in this case—which is denied by the defendant—it is apparent from the evidence that the supply of water being furnished to the city of Pocatello is ample for all purposes.

Mr. Winter, the superintendent of the Water Company, measured the inflow into the reservoir on August 25, 1911 (T. p. 286)—the year of greatest scarcity. On this date, said Mr. Winter, the flow was the least that he had ever ob-

served, as he thinks. The measurement was made by noting the time required to raise the height of the water in the upper reservoir one foot. This reservoir, being 300 by 100 feet, to put one foot of water in it would mean 30,000 cubic feet or 225,000 United States gallons, of 231 cubic inches each. According to this measurement, the flow into the reservoir at the lowest stage it had ever been seen by the superintendent was 3.14 second feet, an amount but little under the total required for all purposes by a city of 10,000 inhabitants, as stated by Congdon in his report to the mayor and council—his estimate of the requirements being 3.7 second feet.

No more satisfactory test than that conducted by Mr. Winter is known and his measurements may be taken as showing the amount of water being actually supplied by the water company at the driest season of the year. On a basis of a population of 10,000, we have 204 gallons per capita per day, and, on a basis of 5,072, the actual population that the water company found by its census, it was furnishing water to, we have a daily per capita of 402 gallons.

But, while we are on the subject of these measurements and the extent of water supply, it will be helpful and instructive to take the figures of Mr. Ashton, principal expert witness for the city. It cannot be claimed for Mr. Ashton's figures that they have that degree of accuracy which the measurement of Mr. Winter has, but, such as they are, the following is a summary, made by Mr. Winter, and included in his testimony at pages 287 and 288 of the transcript:

“Mr. Ashton found: that is in Gibson Jack, 1.95 second feet, Mink, .56 and Cusick .05, total 2.56. Now, if we take 2.56, which was the second delivery, and multiply it by 60 we will get 153.6 per minute. If we multiply that by 60 we will get 9,216 second-feet of cubic feet per hour. That multiplied by 24 gives 221,184 cubic feet per day. Reducing that to United States gallons by multiplying by $7\frac{1}{2}$ gives 1,658,880 gallons

per day, per Mr. Ashton's measurements. One second-foot means 648,000 gallons per day of 24 hours. Continuing with this calculation on Mr. Ashton's basis that the supply was then 1,658,880 gallons per day, it would mean, according to Mr. Ashton, that it would take 3.23 hours to put one foot of water in the upper reservoir, against an actual observation of mine of 2.64 hours, not made upon the same day or checked at that time, which I probably would have done had I known that Mr. Ashton, or anyone else was gauging our capacity. 1,658,880 divided by 100 leaves 16,588, the meaning of which is that the quantity of water estimated by Mr. Ashton will supply a population of 16,588 people on a basis of 100 gallons per capita per day. Dividing 16,588, the assumed population that this would supply, by 5,072, the actual population that the Water Company found by its census it was furnishing water to, we find that would be 327 gallons per capita for our population in the dry season of the year. This is without taking our own measurements at all, which would be more."

Per Capita Consumption.

Mr. W. E. Moore, of Spokane, Washington, a civil and hydraulic engineer, whose experience extends over a period of more than twenty years, ten years of which were spent in observations and experiences as superintendent of a water system supplying water for domestic uses and for irrigation, states, as the result of his experience (T. p. 315) :

"That where the consumers have been on a meter basis they get along very comfortably on from five to eight thousand gallons per month per family of an average of about five people, that from five to eight thousand gallons per month serves for all the water used on the premises. That does not include water for fire purposes and for street sprinkling. The amount needed for those purposes varies considerably, but on general principles, in my estimation, it runs from ten to fifteen gallons per day per capita, for all street sprinkling and fire protection."

Witness stated (T. p. 315) that the estimate of from five to eight thousand gallons per month per family of an average of about five people "included the sprinkling of lawns—everything that the water was used for on the premises."

The company of which Mr. Moore was superintendent for a period of ten years supplied water for the irrigation of from seven to eight thousand acres in an arid section and supplied water for domestic uses to a town of thirty-five hundred population (T. p. 313).

Mr. Moore's conclusions, based upon the measurements of Mr. Winter, superintendent of the Water Company, of 3.14 cubic feet per second (T. p. 286) and on those of Mr. Ashton, chief expert for the city, of 2.56 second feet delivered (T. p. 287) are both interesting and instructive.

He says (T. p. 315) :

"3.14 cubic feet on a basis of 10,000 population would be about 203 gallons per day per capita. That would be considerably more than double the amount necessary. On a basis of 2.56, I have a calculation made here. I have deducted 220,000 gallons per day, being 4,000 gallons per day for each of the 55 fire hydrants. That leaves a balance of approximately 143 gallons per day, based on a population of 10,000 people. A population of 5,072 (the number of actual water users under the system) gives 282 gallons per capita per day. There is no question but what it is excessive. I haven't any hesitation in saying that, exclusive of the city's use, an allowance of from 55 to 65 gallons per capita is sufficient for Pocatello."

In reply to the court (T. p. 317) witness says:

"I should think an average of about two acre feet would be necessary to irrigate farm lands in this vicinity. I think a second-foot flow for 100 acres of ground is ample, unless there is some peculiarity of the soil, for general farming. It requires less for orchards if they are properly taken care of."

Witness further stated (T. p. 319) that he had made observations in Blackfoot, Custer, Twin Falls country (the section of Idaho where Pocatello is located) for the purpose of obtaining knowledge as to the amount per acre required to irrigate farming land; that in one of these localities they were using about a second foot for 80 acres, which amount witness did not think was necessary.

On the subject of daily per capita required, Mr. G. A. Elliott, superintendent of the Spring Valley Water Company of San Francisco, stated (T. p. 320) that, as a civil engineer, he had looked up the water supply and the probable per capita supply of other cities; that part of his work was to design a system to take care of San Francisco when it should be fully built up; that he had read up on the consumption, probable consumption, of cities all over the world; was engaged in this kind of investigation something like eight months.

(T. p. 321): "In a city of 10,000 where there were no manufactories conducted, 40 gallons per capita would be ample, exclusive of irrigation."

Continuing, witness referred to the City of Oakland, which, as he testified, was located in the semi-arid belt where there is rain for about six months and it is dry for about six months and where it is necessary to use water artificially in order to have lawns grow. Witness stated that his observations showed that ten gallons per capita per day in the summer time for the period of six months, that is, five gallons per capita all the year, was used for lawn sprinkling; that his estimates included the use of water by railroads and that, where railroads had their own water (as in Pocatello), the per capita would be less.

Respecting the situation in Pocatello, witness said (T. pp. 322-323):

"I estimated in the matter of lawns here, 103 acres. I figured on the basis of one second-foot for eighty

acres, and took into consideration the amount of 4,000 gallons used by each of the 55 hydrants; figuring on irrigating 103 acres it leaves 820,000 gallons per day over, based on a supply of 2.56 second-feet (minimum supply as measured by Mr. Ashton, chief expert for city), and that amounts, including the hydrants allowance, to over 82 gallons per capita per day, or excluding the hydrants allowance, 60. That 60 gallons would simply be for domestic use in the interior of the house, drinking, cooking and toilet uses."

It is likely that this witness will be quoted as authority for the statement that one-half of the total amount of water is lost in the system. It is evident that this witness did not intend to be so understood, and there is no authority anywhere else to be found which supports such a conclusion.

What the witness did say is reported as follows (T. pp. 326-327) :

"I have found the waste to be in San Francisco, from misuse, either through loss in the company's system, or the people's system, to be about one-half of the total amount delivered. I don't mean by waste, the water used for irrigation, but through leaky fixtures, or leaks in the joints of the pipes underground." * * *
 "'Waste' includes misuse by the consumers, everything but actual necessary use. Eliminating waste, which should be done in every town, and making what I consider a liberal allowance for lawns, it would seem to me that at the very outside 80 gallons per capita per day should cover all uses; and I make that statement having in mind that there is at the present time, as I understand it, a right for the city to use 220,000 gallons a day for hydrant purposes, and I know from actual experience that the use of that amount of water is practically impossible for fires and street sprinkling. Five gallons a day (per capita) would be ample for that use."

The following quoted from standard works on engineering included in the testimony of Mr. Winter, superintendent

of the Water Company, together with his own observations, supports the conclusions arrived at by the engineering experts of defendant, Mr. W. E. Moore and Mr. G. A. Elliott. We quote from the record (T. pp. 289 to 292) :

“As to the amount that would be reasonable in the arid region for domestic and business purposes, I can answer that in two ways, one from my own actual knowledge and the other by engineering authority. (Reading from book, Water Supply Engineering, Follwell, Article 13, p. 33) :

“Quantity for city and suburban use. In a private residence the water furnished is used for drinking, cooking, washing, and other domestic purposes, for watering horses and cattle, washing carriages, and other stable duties, and for sprinkling lawns, flower beds, etc. The approximate quantities so used on an American suburban property probably average about as follows: For ordinary indoor use 15 to 25 gallons per capita per day; stable use 50 to 200 gallons for each horse and carriage. For sprinkling lawns in summer and wasted to prevent freezing in winter from 200 to 2,000 gallons per house per day during the coldest and driest weather, say four months of the year. * * * For city residences or those having small yards, and where stables are few, a yearly allowance of 20 to 30 gallons per capita per day should be ample for domestic use. * * * Twenty to forty gallons per capita for office buildings, stores, restaurants, hotels, elevators, factories, etc. For public schools, street sprinkling, sewer flushing, fountains, and extinguishing fires three to five gallons per capita, and for losses three to seven gallons.’

“Mr. Trautwine, a distinguished engineer, and the author of a textbook on civil engineering that is recognized all over the United States, and probably all over the world, for a number of years manager of the Philadelphia water works and I think secretary of the Society of Civil Engineers, says, under the head of ‘Water Supply’:

“ ‘Owing largely to the proper extension of the use of water in dwellings, the quantity required in cities increases faster than the population.’ ”

“In other words, the per capita consumption increases. The meaning of which, as I understand, is that with modern facilities, baths and sanitary appliances, people now use more water per capita than they used to do in the days when Solomon built palaces without any sanitary accommodations at all. Under the head ‘Use,’ Mr. Trautwine says:

“ ‘Abundant experience shows that a supply of 50 gallons, or say seven cubic feet per capita per day is abundant for all the needs and luxuries of well-to-do families in American cities. The manufacturing consumption of course bears no fixed relation to the population. In cities, it is generally much less than the domestic consumption.’ ”

“Under ‘Waste’:

“ ‘In American cities the waste often amounts to two or three times the quantity really used. Of the 116 gallons per capita per day delivered in New York in 1899, Mr. Freeman estimates that from 31 to 56 gallons were used, 10 unavoidably wasted, and from 50 to 75 avoidably wasted. In Philadelphia investigations by means of the Deacon waste detector on 142 modern seven-roomed two-story dwellings, with bath, etc., on two intermediate streets, showed that of 222 gallons per capita per day furnished through 782 fixtures, 192 gallons, or 86½ per cent were wasted and only 30 gallons, or 13½ per cent, were used. The city is now building enormous works for the purpose of pumping, filtering, conveying, re-pumping, storing and distributing the water wasted, as well as the smaller quantity used.’ ”

“My own observation on my own premises (Mr. Winter), which consists of a cottage of five rooms and two lots, with hot and cold water, closet, sink and what not, 28 trees, lawn and shrubbery, is that in the non-sprinkling months 63 gallons per day were used for the house, not per capita. For the sprinkling months, May, June, July, August, September, an average of 300 gallons per

day was used and for July and August 393 gallons per day. A lot is 30 by 140. The per capita per day for the non-sprinkling season is 21 gallons; for the sprinkling season 100 gallons and for July and August, 131. I divided the actual amount of water used by the number in the family, three. In a family of five the per capita would be that much lower because the lawns and trees are all the same and it is the lawn and trees that use up the water.

"It would be easy to deduce some figures on the quantity of water required for lawn purposes from the figures I have given. The per capita for the non-sprinkling season is 21 gallons, for the sprinkling season, 100 gallons, 21 from 100 leaves 79 per capita, not per lot, and for July and August it would leave 111. It would be a great deal higher for a family of five. In my judgment 50 gallons per capita is a reasonable amount for lawn and everything."

Knowledge of City of Quantity of Water Being Supplied and of Waste by Consumers.

The city was informed by the report of its own engineer rendered during the dry season of 1911, of the quantity of water flowing into the reservoir; and that the wasting of water prevented the filling of the same.

The report of J. P. Congdon, city engineer, to the mayor and fire and water committee of the city council of the City of Pocatello will be found in the record at pages 414 to 418.

This report is referred to here, for the sole purpose for which said report was admitted, to-wit, as showing that the city was informed of conditions existing at the date of said report, July, 1911; also of the quantity of water which was being furnished by the Water Company; that, notwithstanding the relatively large quantity of water flowing into the reservoirs, the reservoirs were empty; that, to quote Mr. Congdon (T. pp. 416-417), a good deal of waste was going on, water being allowed to run for long periods forming

mudholes along the streets and in the adjoining lots and that the entire supply available for the city was being consumed at that time, so there was no chance for the reservoirs to fill up; that Mr. Congdon also recommended to the mayor and city council that the people be urged to use the greatest care, not allowing faucets to run needlessly, sprinkling hours be regulated and other like recommendations.

Experience shows that the per capita consumption under a meter system is many times less than where no meters are employed. Common observation and common sense indicate that the only rational and equitable system for furnishing water to consumers is by meter measurement.

The schedule of rates under ordinance 86, as well as ordinances 46 and 59, of the City of Pocatello, made no provision for meters. The testimony contained in the record (T. pp. 244, 295, 300, 301, 304, 307, 334, 339, 348, 361, 367) shows that the subject of meters was several times considered but that no conclusion was reached. We do not deem it material in this case to determine whether the failure to install meters lies with the Water Company or with the city. The absence of meters is of significance only as accounting in a large measure for the enormous and, as the Water Company claims, unwarranted consumption of water. It is reasonable to believe that this condition will be relieved when modern methods for measuring water to the consumer shall have been installed, as is likely under orders of the Public Utilities Commission of the State of Idaho, which now has the subject of rates to be charged by the Pocatello Water Company under advisement.

Purity of Water.

It was established beyond dispute and controversy, upon the trial, by the testimony of witness F. O. Leonard, a chemist (T. pp. 236-240), that the water supplied by the Pocatello Water Company to its patrons is exceptionally free

from impurities or anything that would tend to disease. Mr. Leonard made several tests (some for the Water Company and some at the request of the city health officer), with results entirely satisfactory, as appears, to the health authorities of the city (T. p. 239) as well as to the court (T. p. 88).

In this case conditions did not exist which under the authorities cited by counsel for the city, would justify the court in entering a decree annulling the ordinance.

Counsel for the city, in the court below, cited a number of cases in support of their contention that the facts in this case warranted the court in annulling and setting aside the ordinance in question and counsel for appellant, Murray, beg the indulgence of the court for anticipating a like reference to these cases in the briefs of counsel for the city which shall be filed in this court.

As to the cases thus cited, counsel for appellant, while acknowledging the principles of law enunciated in those cases, desire to impress upon the court a distinction as they believe easy to be made, between each and every of the cases cited and the one now under consideration.

Palestine Water & Power Company v. City of
Palestine, 40 L. R. A.

This is a case where the water furnished was wholly unfit for use. The City of Palestine instituted suit in the state court to forfeit the franchises granted by it to the predecessor of the water company, which required "the supplying of clean and wholesome water for all domestic and other purposes." The ordinance further provided originally that, in the event of a suspension of the supply or in case of an insufficient supply of clear wholesome water for domestic and other purposes for a period exceeding sixty days, all franchises thereby granted should be forfeited and water

rentals should not be payable for the period covered by the suspension.

This section of the ordinance was later amended to provide that the grantee should forfeit "*all exclusive franchises.*"

Following the ordinance, the city and the grantee, under the ordinance, entered into a contract along the same lines.

The evidence showed that the water furnished was neither clear nor wholesome but was unfit for domestic purposes and that the supply of even bad water was inadequate; that the source consisted of ponds fed by surface water and some springs; that these ponds had not been cleaned out; that there was five or six feet of decayed vegetable matter, of mud and accumulations of filth; that stock were kept in the same field with the ponds and that dead fish and reptiles remained in the ponds and dead animals reposed within the area of the water supply. In the summer, conditions became worse, the water stagnant and impure and nearly the whole year the water was more or less muddy and offensive in odor. The evidence showed that an abundant supply of clear wholesome water from artesian wells could be had in the city and that no effort was made by the company before the institution of the suit to obtain water supply.

At the trial and the hearing, however, the company urged its ability and disposition to furnish all the water required by the ordinance, which offer was held not to constitute a reason why the court should withhold a decree forfeiting its franchise. The court, p. 208 (2), quoted with approval the following language from another case:

"When a cause of forfeiture has arisen, whether from nonfeasance or otherwise, no case nor dictum can be found that it shall be legally atoned for by subsequent good behavior."

The court says, in the case at bar, that the Water Company did not mend its ways nor offer to do as it was required to do until after the suit had been brought. It then quotes from *Trust Company v. Galesburg*, to the effect that an action for specific performance or for damages would be inadequate; that "a decree that the company should furnish clear and wholesome water could have been enforced only by placing an officer of the court in charge and operating the works.

A most important observation is made by the court respecting the conditions of the forfeiture prescribed in the ordinance and says (p. 207) :

"In the view we take of the case, it becomes unnecessary to determine whether, under the terms of the ordinance and contract a forfeiture of all franchises granted did occur or only a forfeiture of the exclusive character of such franchises, because, in our opinion, the judgment of the district court is sustained by the law independent of the terms of forfeiture which were prescribed by the ordinance and contract."

The court then quotes from Section 52 of Booth on Street Railways, a paragraph which contains this sentence :

"The right (of forfeiture) exists at common law and may be asserted not only for the violation of express charter duties but was for a wanton disregard of regulations imposed by the state or municipality in the exercise of their reservoir powers."

As to the conduct of the company, the court says (p. 208, 1) :

"The facts found by the trial judge show that the water company was guilty of a most flagrant disregard of its obligation to the city and instead of furnishing clear and wholesome water, as it was obliged to do, it furnished to the inhabitants of that city water which endangered the health and lives of the people, if in fact

it did not cause sickness and death to prevail among them," * * *

and says:

"that the remonstrances against the disregard by the company of the agreement to furnish good and wholesome water were utterly ignored by the water company but repeated by the city until forbearance ceased to be a virtue and became, on the part of the officers of that city, little less than a reprehensible neglect of the highest interests of the people."

It is not difficult to distinguish the case now before the court from the above. The offensive, unwholesome and unhealthful character of the water furnished by the water company in that case left the court no alternative.

Ennis Water Works Co. v. City of Ennis (Tex. Court of Civil Appeals), 136 S. W. 513.

This was a case of exclusive franchise. The City of Ennis owned two reservoirs and a small quantity of distributing pipe. One Morrison, grantor of defendant, owned a distributing system in the City of Ennis. The city, by ordinance which is set out in full in the opinion, granted Morrison an *exclusive* franchise for a period of thirty years to supply the city with water, permitting him to take water from the lakes or reservoirs belonging to the city; also to use the pipe belonging to the city.

The ordinance was attacked on the ground that the exclusive right and privilege granted to Morrison "tended to the creation of an unlawful monopoly, in violation of Art. 1, Sec. 23, of the Constitution of Texas, prohibiting monopolies and perpetuities." (516).

The court declares this to be the pivotal question for decision and the case goes off entirely on this question.

The invalidity of the franchise having been decreed, the next question was the disposition to be made of the property of the defendant and the provision to be made

meanwhile and until the city could complete the system of water works which it had inaugurated, for supplying the city with water. On this point, the court held, as recited in the memo brief of counsel for the City of Pocatello (p. 517).

The last paragraph of the opinion is:

"While the court adjudged the contract void, it, nevertheless, had the power, in view of the public necessity existing, to suspend the judgment until other arrangements could be perfected for the supply of water. The judgment does not seem to be inequitable to the appeal and we think there was no error therein."

City of Grand Haven v. Grand Haven Water Works, (Mich.), 57 N. W. 1075.

This was a case of insufficient supply and bad water. The City of Grand Haven owned a small system of water works. These were inadequate to supply the city and the city having decided that it was inexpedient for the city to build works of sufficient capacity, granted a franchise to a private individual in accordance with the terms which the latter proposed and embodied the same in an ordinance. Before the works were completed, the city discovered that the works were not being constructed in accordance with the contract; that they were inadequate and that the supply of water in point of purity would not come up to the standard; that wells from which it was intended that the supply of water should be secured were totally inadequate for the purpose; that, upon test, they were emptied in twenty minutes and the supply thereafter obtained from the river; that the waters of the river were impure, unhealthful and deleterious to health, the court citing the evidence to prove this.

Several grounds are urged as a basis for rescinding the contract but the question resolves itself into one of non-compliance on the part of the company with its provisions.

The Court says (p. 1077) the case is similar in principle to that of Trust Company v. Galesburg, 133 U. S. 156.

The Court says that, from the view they take of the case, it is not necessary to discuss all the questions raised by the pleadings and proof and then proceed to review the evidence showing an extreme state of affairs growing out of the inability of the company to supply pure water from the wells and the absolutely bad quality of the supply of water furnished.

This decision quotes extensively from the Galesburg case and says (p. 1078) :

“The danger to the health and lives of the inhabitants of the city from impure water and the continued exposure of the property of the city to destruction by fire from an inadequate supply of water were public questions under the care of the municipality and it was entitled and bound to act with the highest regard for the public interests.”

The decree of the court below was reversed and a decree ordered entered granting the relief prayed for, to-wit, forfeiture of the franchise.

City of St. Cloud v. Water, Light & Power Company (Minn.), 92 N. W. 1112.

A case of impure and unwholesome water. The City of St. Cloud owned a water works but concluded to grant, and did grant, a franchise for a water works and turned over its plant to the grantee named in the ordinance.

By the ordinance, the grantee agreed to supply three million gallons per day of pure water and specified that it should be obtained from a certain source and be filtered and purified prior to being pumped into the mains. The ordinance provided (p. 1112) :

“If, after the completion of the works, there shall be a suspension exceeding thirty days of the water supply for either domestic or fire purposes, the grantees should forfeit all privileges thereby granted, unless

such suspension should be caused by circumstances beyond their control."

After the city had conveyed its works to the company, the system was extended and several miles of mains were laid.

"This action was commenced for the purpose of cancelling and annulling the franchise and privileges granted by the ordinance and to set aside and annul the contract thereby entered into upon the ground that the grantees and their successors had failed to carry out their contract to furnish pure water in a stipulated quantity."

The particular charges against the water company were that it was furnishing unfiltered and impure water, of which fact it had been repeatedly advised and refused to improve its service in that respect. To the complaint filed by the city, the water company demurred and, from an order overruling the demurrer, an appeal was taken to the Supreme Court. The Court discusses the case, treating the ordinance as constituting a contract which the city had a right to enter into and says "that the city is entitled to some relief for the long and persistent failure and refusal of the grantees and their successors to furnish water in accordance with their agreement."

As to the right of the city to maintain the action, the court holds that such right "does not necessarily rest upon the express terms of the forfeiture set out in the ordinance, although the allegations of the complaint would justify the relief based thereon. The legal right rests inherently on the nature of the contract obligations and in this respect the city occupies no different position than would an individual in seeking the assistance of the courts to be relieved from the obligations and burdens of a contract which, by the conduct of the other party, had become intolerable."

The court then holds that, it being the primary duty of the water company to furnish pure water, the city is relieved of the necessity of applying to the State Board of Health to determine whether the water is pure.

It sets aside this requirement.

It further holds that this is not an action to set aside the charter of the company granted to it by the state under general laws and that the city may maintain the action.

It further holds that the fact that the city had been served with unwholesome water for a period of fifteen years would not estop it from requiring the company to comply with its contract to furnish pure water, expressly in view of the continued and repeated protests made.

The court then says it appears from the complaint that the company has, persistently and for a long number of years, refused to comply with its contract and that there has been a continued purpose not to comply.

However, the court says, in concluding its opinion (p. 114) :

“If it should appear upon the trial that defendants may be able to comply with the contract and furnish water in accordance therewith if given reasonable time, the decree of the court should provide that the contract will be annulled and the franchise cancelled only at a time certain within which defendant should be given the privilege of complying with the contract.”

The court closes by quoting *Trust Company v. Galesburg and Palestine Water & Power Co. v. Palestine*, as recognizing the remedy applied in this case.

Capital City Water Company, Appellant, v. State of Alabama, 18 So. 62; 29 L. R. A. 743—*Failure to Furnish a Supply of Pure and Wholesome Water*.

This was a proceeding in the nature of quo warranto prosecuted by the State on the relation of McDonald against

the Capital Water Company for the dissolution of a corporation.

The petition in form was in the nature of a complaint, setting out that the defendant was a corporation chartered under the laws of the State possessed of a franchise for the business of furnishing water to a municipality and the residents of the city of Montgomery; that, under its charter, it became the duty of the company to furnish at all times a sufficient supply of pure wholesome water for the use, domestic and otherwise, of said city and the residents thereof. Notwithstanding which, and in open and flagrant violation of said duties and wilful misuse and abuse of the corporate franchise exercised by it, said company had for three years persistently refused and failed to perform its duty of furnishing any supply of pure and wholesome water, and still persisted in refusing and failing to perform its duty.

Thus it will be seen by the above allegations that the failure and refusal to furnish a supply of pure and wholesome water was total.

The company also had a contract with the city to the same end and purpose, and the same charges of flagrant and persistent misuse and abuse of its franchise in failing to supply the municipality and inhabitants with a sufficient supply of pure and wholesome water is alleged.

The court, referring (p. 746) to the answer or pleas of the defendant, sums them up by saying that there is nothing which amounts to a denial of the truth of the facts alleged in the complaint, but that the case presents (p. 747, 1) a willful failure on the part of the company to discharge and perform its duty.

The court (p. 747, 2) refers to defendant's plea intended to excuse its failure or afford a justification therefor as emphasizing the admission of its failure, and concludes that there is no denial of the failure to supply water

of the prescribed quantity, while there is (p. 748, 1) an express admission that the respondent has not at all times supplied the city and its inhabitants with pure and wholesome water.

This admission of the company is constantly dwelt upon by the court throughout the opinion, and it is evident that such constitutes the basis of the court's decision in this case.

The ordinance contained the usual forfeiture provision, that, if the company should fail in any substantial or essential part to meet the requirements of the contract, and unless within ninety days the work should be made to conform to its provisions, the ordinance might be repealed.

It was contended that this right of rescission was the one and only remedy open to the city, but the court holds (p. 749) that this provision of the contract does not express the whole duty of the company, and that the city, whatever its right to annul the contract, could not take away the life of the corporation.

"Considering the contract as part of the charter, the State might declare forfeiture of the charter for infraction of the duty imposed by the contract; but it by no means follows that the city, having powers only in respect of that part of the charter embraced in the contract, could exert any influence upon the vital principle of the corporate existence which emanated from the State."

To the plea of "unforeseen or inevitable accident" recited in a provision of the ordinance as excusing a temporary failure to comply therewith, the court refers (p. 749) to four droughts, as occurring in two years, that a drought is not an "accident and a failure to bore wells shown to be necessary to an adequate supply in seasons of drought can in no sense be charged to an 'unforeseen and inevitable accident.' "

As to its discretion to declare or to withhold a declaration forfeiting the charter, the court reviews the evidence at length, arraigns the company for furnishing impure water, its persistent refusal to sink more wells for obtaining an adequate supply of pure water, and decides that the company has shown itself unfit to be longer continued in the responsible duty of furnishing the citizens of Montgomery with water, and the pleas that, since the suit was begun, the company has sunk additional wells and is working day and night in the prosecution of the work of increasing its supply is likewise held to be unavailable.

And the company's plea that it had constructed the works of the most approved pattern and of sufficient capacity was held not to answer the purpose, since it was admitted by the company that the quantity and quality of water supplied was not as required by the contract.

The court sustained demurrer to each of the pleas and the respondent declined to plead further. Judgment was entered forfeiting the franchise.

Farmers Loan & Trust Company v. Galesburg, 133
U. S. 156.

The city of Galesburg, by ordinance, authorized one Shelton to construct and maintain waterworks and to give the city an option to purchase the same. The works were for the purpose of supplying the city and its inhabitants "with water for public and private uses," and contains specifications respecting the different parts of the works, which were to be "of sufficient size to furnish all the water required for the wants of the city and its inhabitants." The city, as an inducement, agreed to rent a stipulated number of fire hydrants, with the proviso that it should not be liable for any hydrant rents for such time as the works should not be able to supply the required amount of water.

The terms of the ordinance were accepted, the works

constructed, the test made and the works accepted by the city.

Two years thereafter, the city of Galesburg repealed the ordinance and filed a bill in equity against the water company in the State court, charging that prior to the granting of the ordinance to Shelton, the city had established a system of waterworks for protection from fire, which were adequate for the purpose, which system was in full operation at the time the ordinance was granted. The company answered the bill, pleading justification and denying the right of the city to relief. The Farmers Loan & Trust Company, trustee for the bondholders, having become a party to the suit, secured its removal into the Circuit Court of the United States, where all the subsequent proceedings were had.

This case deals quite largely with the rights of the Trust Company as trustee for the bondholders, nevertheless passes upon several vital and important questions respecting the right of the city to rescind.

As to the nature of the contract contained in the ordinance, the court says (p. 169) :

“The contract contained in the ordinance was an entire one, and was not executed by a partial performance or by a performance as to one of the essential undertakings on the part of Shelton and his assigns.”

and that the obligation of the water company in the construction of the plant within the time limited did not excuse the company in the event of a failure

“to furnish a water supply which complied with the requirements of the ordinance either in quantity or quality—either before or after the expiration of the limit prescribed in the contract for the construction and successful completion of the works.”

The foregoing is in answer to the plea that the city was estopped by the resolution desiring the test to be sufficient

and the works completed in compliance with the contract. It appeared, however, (p. 171) that the company did not complete its works and put them in successful operation prior to the time limit, August, 1884, thereby failing to comply with its contract and that it acknowledged its failure. It then attempted to increase the supply but failed, and a repeal of the ordinance followed. In May, 1888, (p. 175) a decree was entered adjudging the franchise and all rights, franchises and privileges granted thereunder annulled and cancelled, and reinvesting in the city the water main formerly belonging to it.

Beginning at page 175, the court reviews the various points urged by the counsel for the Trust Company, and says (p. 176) that it is clear on the proofs

“that the water furnished by the water company for the period of about nine months during which its works were operated was unfit for domestic purposes; that the course of the city was entirely forbearing and generous towards the water company, and after the gang wells were completed, in November, 1884, the supply of water was inadequate for the protection of the city from fire, and its quality was but little better than before the construction of the gang wells.”

The court says (p. 177) :

“The contract extended, however, to the amount of water which the works should be able actually and permanently to supply and the character of the water to be supplied.”

In concluding its opinion, the court says (p. 179) :

“The principal contention on the part of appellants is that, on the acceptance of the ordinance by Shelton, a right in the franchise vested in him, which could not be defeated even though he afterwards failed to comply with its terms; that the failure of the water company to furnish water in the quantity and of the quality

called for by the ordinance was only a breach of a condition subsequent; and that a court of equity will not lend its aid to divest an estate for such a breach. But it seems to us that in respect to a contract of the character of the present one, the ability of the water company to continue to furnish water according to the terms of the ordinance was a condition precedent to the continuing right of Shelton and his assigns to use the streets of the city and to furnish water for a period of thirty years; and that when, after a reasonable time, Shelton and his assigns had failed to comply with the conditions as to the quantity and quality of the water, the city had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. A suit for a specific performance of the contract, or a suit to recover damages for its non-performance, would be a wholly inadequate remedy in a case like the present. The danger to the health and lives of the inhabitants of the city from impure water, and the continued exposure of the property in the city to destruction by fire from an inadequate supply of water, were public questions peculiarly under the care of the municipality; and it was entitled and bound to act with the highest regard for the public interest, and at the same time, as it did, with due consideration for the rights of the other parties to the contract."

City of Columbus, Appellant, v. Mercantile Trust & Deposit Company of Baltimore, Trustee, and the Columbus Water Works Company and W. S. Greene, Respondents. 218 U. S. 645.

A bill by the trustee under a mortgage by the Water Company to enjoin the city from constructing and operating a municipal water system, and thereby incurring the obligations of a contract, whereby the city granted the Water Company an exclusive right to maintain a water system for 30 years.

It is averred by the bill and admitted that legislative authority has been granted the city to issue bonds to con-

struct the system and that the necessary ordinances have been passed, and that the city refuses to consider the contract with the Water Company as binding, and proper notice given.

The defenses are that the city has no power to make an exclusive contract; that the hydrant rentals created an aggregate indebtedness prohibited by the constitution; and that the Company had not kept its contract in respect to the capacity or character of the plant, and failed to provide an abundant and constant supply of pure and wholesome water, and thus compelled the city to provide its own system.

Before the bill had been filed by the appellant, the trustee had filed a bill to foreclose the mortgage, reciting that the Water Company had, in its mortgage (or rather deed of trust), agreed not to suffer or do any act that would impair the security of the bondholders under the mortgage, and would keep its machinery, etc., in good condition, etc., and from time to time make all necessary improvements and betterments.

The bill for foreclosure alleges the failure of the Water Company to make the necessary betterments, and alleges as the reason therefor that the action of the city of Columbus in seeking to build its own waterworks had prevented the Water Company from selling its reserve bonds, and thus prevented the Water Company from obtaining means to furnish an additional water supply occasioned by unprecedented droughts that had caused a failure in the supply from original sources. Under this bill, which was not opposed, a receiver was appointed, and \$50,000.00 in receiver's certificates issued and expended in improvements. An amended bill was filed in the case at bar, the fact of the pendency of the foreclosure suit was set up, and also the fact that the receiver was supplying an abundance of wholesome water. Upon the amended bill and answer and cross-

bill and answer, a hearing was had in the court below, and an injunction granted pending the suit, and the case referred to a master to take proof and report findings of law and fact. Later, the city filed a petition to dissolve the injunction, showing that both the reservoir and water supply had failed, and the injunction was dissolved. The master filed findings of law and fact, the findings of law being modified by the court on final hearing, and ruling that the rescission of contract asked for by the city under its cross-bill would be denied unless the waterworks plant should be purchased by the city at a fair valuation. The city appealed.

How and Wherein the Above Entitled Cause is Distinguished From the Case Now on Trial.

The contract between the City of Columbus and the Water Company did not name the *source of water supply*, or go into any particulars in that regard. The Water Company (p. 657), obligated itself to provide "all the real estate, rights of way, water rights, and water that shall be found requisite for the successful prosecution and operation of the waterworks," and also to supply the necessary dams and embankments and to construct "a storage reservoir having an available capacity for the storage and supply of 125,000,000 gallons."

In the case now before the court, the defendant did not obligate himself to comply with any such conditions. There was no agreement as to storage capacity of reservoirs, etc. He did not agree to provide a water supply except from particular sources, to-wit, Gibson Jack Creek and Mink Creek, which are mentioned directly in sub. 2, 7, Ordinance 46, as the positive source of supply; also mentioned in the preamble of Ordinance No. 59, and said preamble utterance referred to and adopted in sub. 6 of said ordinance.

In the opinion Mr. Justice Lurton (p. 658) says:

“The single object of the agreement was to obtain a constant and adequate supply of wholesome water. This was *guaranteed in express terms*, to say nothing of the necessary implication from the character of the contract. This guarantee was a continuing one, and dominated every other detail of the agreement. *The Company selected its own source of supply*, and was under the highest obligation to furnish an ample supply for all purposes of water that should be wholesome, that is, clean, pure and fit for domestic use. This supply was to be adequate not only for the needs of the present, but ample to meet the demands of the people.”

The contract called expressly upon the Water Company to furnish a “*sufficient supply of wholesome, constant and ample water.*” It seems that this clause which is dwelt upon throughout the decision is an integral part of the contract itself, and whether or not if it had not been so expressed, it would be a “necessary implication from the character of the contract,” is not decided. Nor is it important here whether or not there was such a necessary implication, as we will attempt hereafter to show. The decision throughout is *based upon the failure of the Water Company to comply with the express terms of its contract with the city.*

But how is it in the case now upon trial? Not only did defendant agree to take the water provided for from certain named streams, and not assume the burden of finding a source of supply, but his obligation as to the supply from the creeks named is in far different terms. We cannot, from looking at the provisions of Ordinance No. 86, find what kind of water is to be furnished. True, the preamble in its first subdivision refers to “pure and healthful” water. This is the expression used in subdivision 2 of Ordinance No. 46, and the expression is also used in the preamble of Ordinance No. 59. The only reference to water supply in No. 86 is in subdivision 6, wherein it is provided that a

failure on the part of defendant Murray to "*supply sufficient water for the needs of the City of Pocatello and the inhabitants thereof*, the city can secure a further supply from any other source, directly or indirectly, without reference to the provisions of this ordinance."

We do not intend to urge that the water supply by defendant need not be pure and healthful, but we do insist that the reiteration of this idea by Justice Lurton in the decision we are considering was on account of the conditions of the contract itself, and of the obligations therein by the Water Company expressly assumed, not on account of any duty imposed upon the company outside of the expressed terms of the contract itself.

Justice Lurton further says:

"It is a serious matter to undertake to supply the inhabitants of a city with *an ample supply of good and wholesome water, and persons entering into a contract to do this* must do so with an understanding of the important character of the undertaking."

Undoubtedly, the correct reasoning well urged, but it goes to show the accuracy of our former contention that it is the expressions of the contract and the obligations expressly assumed by the Water Company in the contract itself that prompts the expressions used by the Justice.

What was the City of Columbus permitted to do under the decision commented upon?

The relief asked by the city was an affirmance of its right to construct its own water plant without being compelled to purchase any part of the Water Company's plant. This was the entire relief granted.

Apply the principle announced to the conditions surrounding the case at bar, and admitting all the contentions of the plaintiff for purposes of argument, and to what conclusion must we inevitably come? Simply to this: That the

contract here (Ordinance No. 86), having provided by subdivision 8, that the penalty imposed on defendant Murray for failure to supply sufficient water shall entitle the city of Pocatello to secure a *further supply* of water from any other source without reference to the provisions of the ordinance itself; the city, therefore, is entitled to put in its own water plant; or to make arrangements with other persons or companies to supply the water used by the city. That is all there is to it when it comes to applying the City of Columbus case to the one at bar.

And again, applying the principles in the Columbus city case to the above, we find from an examination of that case, that no agreement apparently was entered into between the City of Columbus and the Water Company with reference to what the penalty should be in case the contract itself was violated. That the contract was violated is shown by the report of the master, but it is not upon the violation of the contract that the decision depends. The master's report shows that not only did the Water Company fail to supply a constant supply of pure and wholesome water, but went farther and showed that it was impossible for the Water Company to secure a supply of water of that kind. In fact, it would appear from the decision that had the company been in a position to have so supplied the City of Columbus, there would have been an end of the proceeding, but the injunction, requiring the city to desist from any further attempt to install municipal waterworks was dissolved, because, as shown by the decision, there was no opportunity on the part of the Water Company to supply the water it had agreed to supply from any source.

As hereinbefore argued, the only decision that should be rendered in the case at bar, under the pleadings, is one permitting the city to proceed as contemplated in subdivision 8 in the contract, No. 86. That this ordinance is a contract goes without question; that the parties had a right to make

a contract of this kind seems equally clear. Give to the plaintiff the benefit of all doubts, construe the pleadings and the proofs as strongly in his favor as possible, and there is still no doubt as to the power of the court to stay proceedings so far as judgment and decree is concerned a stated length of time so that the proper tribunal, to adjust rates and compel compliance with conditions such as have arisen in Pocatello, can formulate its ruling and decision. The Public Utilities Commission, created at the last session of the Idaho Legislature, has power to take action in such matters, with power to require a water company to make betterments when necessary and to regulate the prices to be charged for water.

In addition to the grounds hereinbefore urged for reversing the decree in this case, counsel for the Water Company would suggest, if the suggestion may with propriety be made, that such action would open the way for the court below to relegate the whole subject to the Public Utilities Commission, which tribunal is, usually, first called to hear and decide the questions which are presented in this case.

N. M. RUICK,
HAWLEY, PUCKETT & HAWLEY,
Residence, Boise, Idaho,
Attorneys for Defendant and Appellant.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

JAMES A. MURRAY, DOING BUSINESS UNDER
THE NAME AND STYLE OF THE POCA-
TELLO WATER COMPANY,
APPELLANT,
VS.

THE CITY OF POCA TELLO, A MUNICIPAL COR-
PORATION, APPELLEE.

APPELLEE'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, EASTERN DIVISION.

D. WORTH CLARK,
JESSE R. S. BUDGE,
W. H. WITTY,

*Attorneys for Appellee,
Pocatello, Idaho.*

No. 2345

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**
FOR THE NINTH CIRCUIT

JAMES A. MURRAY, DOING BUSINESS UNDER
THE NAME AND STYLE OF THE POCA-
TELLO WATER COMPANY,
APPELLANT,
VS.

THE CITY OF POCA TELLO, A MUNICIPAL COR-
PORATION, APPELLEE.

APPELLEE'S BRIEF

STATEMENT.

This suit was brought for the cancellation of a franchise granted to the defendant James A. Murray upon June 6, 1901, relating to the furnishing of water for the use of the City of Pocatello and its inhabitants, as appears from its Ordinance No. 86, a copy of this ordinance being attached to the amended bill of complaint. (Tr., folios 12 to 20, pages 14 to 22). At the time Ordinance No. 86 was passed the defendant James A. Murray owned and was operating a water system by which the City of Pocatello was supplied with water under a former ordinance Numbered 59 (passed June 8, 1898), which

was in favor of the Pocatello Water Company, a corporation, said Ordinance No. 59 confirming and continuing in it as assignee certain rights and privileges theretofore conferred upon the defendant, and his then associates, F. D. Toms and John J. Cusick, by Ordinance No. 46 passed January 4, 1892. Copies of these ordinances are attached to the answer to the amended bill herein, Ordinance No. 46, being found between folios 42 and 46, and Ordinance No. 59 between folios 46 and 51 of the transcript, both of said ordinances included in transcript pages 49 to 58. In the amended bill the city alleged that Murray had not performed the conditions subsequent contained in said ordinance which were the consideration for the granting of the same, and that in addition to that fact it is alleged that he had not furnished under the provisions of any of said ordinances an adequate supply of water for the use of the city of Pocatello and its inhabitants, and had failed to extend street mains and adopted many other oppressive policies. The source of the water supply is three small mountain streams known as Mink, Gibson Jack and Cusick Creeks. The flow of Mink Creek during the dry season above the intake of the Mink Creek pipe line in each year being conceded to be something in excess of three cubic feet per second; of Gibson Jack Creek about two cubic feet, and Cusick Creek is a negligible quantity in the dry season. The water from Mink Creek is conveyed by a pipe line about six miles in length and which has a theoretical capacity of approximately seventy-five hundredths of a second foot, and an actual capacity of between forty-six hundredths and fifty-six hundredths of a second foot (folios 117 and 143 of the transcript). This pipe line

discharges a portion of the waters of Mink Creek into Gibson Jack Creek. From that point the waters of Mink Creek and Gibson Jack Creek are united and carried through a single pipe line to the upper reservoir situated on the bench above and near to the city of Pocatello. (Folio 143 Tr.) It is, therefore, only such water as can be conveyed through the pipe from Gibson Jack Creek to the reservoir aided by such an amount as may be found in Cusick Creek at certain times of the year that reaches the city through this water system, and there are times during the dry season when Cusick Creek runs dry, and it, therefore, cannot be depended upon as a permanent supply. (Folio 239, Tr.)

At the time of the passage of Ordinance No. 86, no water was being used from Mink Creek except such water as could be conveyed through a wooden flume, which was replaced by the pipe line in question shortly after Ordinance No. 86 was passed. The defendant's water system is the only one furnishing water for sale, rental or distribution to the city of Pocatello or its inhabitants, and the water is used by the municipality for street sprinkling and for protection against fire and by the inhabitants for domestic and manufacturing purposes and during the summer season for their lawns, trees and gardens. The population of the city is upwards of 10,000 inhabitants, this population being approximately twice as much as the population of the city at the time Ordinance No. 86 was passed. As given by the Mayor at the time Ordinance No. 86 was passed the population of Pocatello was about 5000, the 1910 census shows 9,100, and there has been considerable increase since that time. In the year 1905 and after the passage

of Ordinance 86 and after the construction of the pipe line from Mink Creek to Gibson Jack Creek, the water situation became acute (testimony W. H. Cleare, folios 144-145), and since that time it appears that practically every year water troubles developed. In the year 1911 all the reservoirs ran dry, and the city was without fire protection and the management of the plant was temporarily taken out of the hands of the Superintendent (folios 193 to 195, Tr., and other testimony as appears in transcript). Ordinance No. 59 reaffirmed the grant of Ordinance No. 46, established a schedule of water rates and required the water company to substitute a steel pipe for the wooden flume by which the waters of Gibson Jack and Mink Creeks were carried to the reservoir. Ordinance No. 46 grants to defendant Murray and his associates a franchise to lay pipes in the streets and to supply water to the city of Pocatello and its inhabitants for a period of fifty years and three conditions were imposed, as follows:

First: Murray and his associates were to complete the plant and be ready to deliver water within the period specified.

Second: The water supply was *to be conveyed from the creeks on Fort Hall Indian Reservation known as Mink and Gibson Jack creeks* and was to be sufficient to supply both the public and private use and purpose of citizens and inhabitants of the town of Pocatello, and was to be of pure and healthful quality.

Third: The water was to be conveyed to and confined in a suitable and substantial reservoir or reservoirs at

a point above the town so as to furnish a pressure of 150 pounds.

The immediate laying of certain prescribed mains and laterals for the distribution of water is provided for in the following language:

“Thereafter main pipes and laterals may be laid as the occasion or consumption demands.”

Then Ordinance No. 86 was passed and the conditions therein to be performed by the water company are described in the preamble, which reads as follows:

“Whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink Creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money.”

Then Section 6 provides as follows:

“Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.”

Section 8 provides:

“If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any source, directly or indirectly, without reference to the provision of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply.”

ARGUMENT.

Points and Authorities.

That an equity court will in a proper case declare forfeited and cancelled a franchise of this character is so well settled that it is unnecessary to discuss the law further than to cite the authorities so holding. The following cases appear to be in point:

City of Columbus vs. Mercantile Trust Co., 218
U. S., 645.

Farmers Loan & Trust Co. vs. Galesburg, 133
U. S., 156.

City of St. Cloud vs. Water, Light & Power Co.,
92 N. W., 1112.

Capital City Water Co. vs. State, 18 So., 62.

Grand Haven vs. Water Works, 57 N. W., 1077.

Water Co. vs. Jackson, 19 So., 774.

Palestine Water Co. vs. City of Palestine, 40 L.
R. A., 203.

Ennis Water Works vs. City of Ennis, 136 S. W.,
512.

“Where doubts arise as to the intent of the parties such doubts must be resolved in favor of the public.”

Stein vs. Beinville Water Supply Co., 141 U. S.,
647.

Construction of Provisions of Ordinance No. 86.

Under the provisions of Ordinance No. 86 the agreement by the defendant to “make all extensions of street mains warranted by the growth of the city” is in effect the same as the provisions of Ordinance No. 46, which provides for the furnishing to the city of Pocatello, and its inhabitants of a “*sufficiency of pure and healthful water,*” and in such a way as to “convey water to the citizens and inhabitants of the town of Pocatello within one year from and after the passage and approval of the ordinance.” The said Ordinance No. 46 also provided that certain mains and laterals were to be immediately constructed and other mains and laterals not immediately necessary were not to be laid in advance of the actual need thereof. Therefore, when analyzed, it will appear that only one obligation was imposed upon Murray by the provisions of Ordinance No. 86 and that was “*to bring in the waters of Mink Creek.*” Ordinance No. 46 had in it (folio 43, Tr.), the following provision:

“That said water so used, shall be conveyed from the creeks on the Fort Hall Indian Reservation, known as Mink and Gibson Jack Creeks, and shall be in quantity sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello, and shall be of pure and healthful quality.”

Therefore, if the city received anything at all for the numerous burdens imposed upon it by Ordinance No. 86, it was such benefit as they received when there was placed in Ordinance No. 86 the agreement of the defendant "*to bring in the waters of Mink Creek*" and if that only meant what the defendant contends that it meant, that is, such an amount of the waters of Mink Creek as he might think sufficient, then certainly there can be no contention but that this matter was fully covered by the provisions of Ordinance No. 46, because in Ordinance No. 46 was the statement:

"That said waters so used, shall be conveyed from the creeks on the Fort Hall Indian Reservation known as Mink and Gibson Jack Creeks and shall be in quantity sufficient to supply both the public and private purposes of the citizens and inhabitants of the town of Pocatello," etc.

And if the contention of appellant is correct, the city received absolutely no consideration for the burdensome conditions imposed upon it by the provisions of Ordinance No. 86. We think the fair construction is that by Ordinance No. 86 the city and Murray agreed as to what was a necessary amount of water, that is *the water of Mink Creek*. In other words, that it was an agreement that the city would consider *the waters of Mink Creek* adequate and that Murray would bring those waters to the city. It is admitted that the defendant has not brought in any considerable portion of the waters of Mink Creek during low water season, or during any of the seasons of the year, the fact being that during the low water season there is always upwards of three second feet flowing in Mink Creek at the intake of the defend-

ant's pipe line and that the actual amount of water diverted is approximately one-half of a second foot. We can say what we have to say in closing the argument upon this phase of the matter no better than by using the words of the learned District Judge, and, therefore, we adopt as a part of our argument the portion of the opinion which reads as follows:

“If, therefore, the city received any consideration at all for the onerous terms of Ordinance 86, it consisted solely and exclusively of such new obligation, if any, as was imposed upon the defendant by his agreement “to bring in the waters of Mink Creek;” and whether this clause does or does not create a new obligation depends upon whether we adopt the construction contended for by the city or that urged by the defendant. By the city it is said the defendant thus agreed to bring in all the waters of Mink Creek, and by the defendant, only such portion thereof as might be reasonably necessary from time to time to supply the public needs. In any view that may be taken of the issue of fact touching the shortage of water, relative to which the evidence is conflicting, what, under this clause of the ordinance and upon the undisputed facts, is the defendant's position? Admittedly the pipe line from Mink Creek is of a capacity little, if any, more than sufficient to carry one-fourth of the flow of Mink Creek, even in the low water season, and therefore if his agreement was to bring in all the waters of the stream he has in a vital matter substantially failed to perform. If, upon the other hand, in accordance with his contention, it be held that by this provision he was required to bring in only such water as was reasonably necessary, then the ordinance must be held to be ineffective and non-enforceable, for in that view it is wholly without any consideration whatsoever, a mere

nudum pactum. Before it was passed, the defendant, by virtue of Ordinance 46, stood expressly obligated to furnish water 'sufficient to supply both the public and private use and purpose' of the city and its inhabitants, and to convey the same from Mink Creek, as well as Gibson Jack. Such a construction would therefore be fatal to the entire defense, for under it the ordinance becomes a nullity, and ineffective either to confer any right upon the defendant or in any respect to bind the plaintiff.

But it is thought that such a view of the meaning of the stipulation cannot be maintained. It is not to be presumed that either the city authorities or the defendant intended to perpetrate a fraud upon the public. It is conceded upon behalf of the defendant that the language of the ordinance is susceptible to the construction urged by the city. Indeed, it can hardly be controverted that such is the natural import of the language; the defendant agreed, not 'to bring in water from Mink Creek,' but to 'bring in the waters of Mink Creek.' The stream is a small one, and it may be readily conceived that both parties were of the opinion that the entire flow was required to supply needs which, if not wholly instant, were so near at hand that immediate provision should be made therefor. The phraseology is wholly inappropriate to convey the limited meaning for which the defendant contends; nor is the language in any other part of the instrument favorable to such a construction. There is no intimation that the necessary conduit was to be added to or increased from time to time as there might be need. Not only were the 'waters of Mink Creek' to be brought in, but the construction of the pipe line by which this result was to be accomplished was to be commenced within ninety days after the approval of the ordinance and carried 'to effective and speedy comple-

tion without unnecessary delays, interruptions or discontinuances.' Such language leaves no room for the theory that pipe lines were to be constructed in installments at such intervals as the defendant might deem to be proper. Force is added to this view by the present strenuous contention of the defendant that the waters of Gibson Jack and Cusick Creeks not only were, at the time of the passage of the ordinance, but still are, more than sufficient to supply all of the plaintiff's needs. If that be the case, and if we adopt the defendant's theory of the meaning of the ordinance, it necessarily follows that the waters of Mink Creek never have been needed, and that therefore defendant never has been under any present obligation to construct a pipe line, either large or small, and that he may at his option, without violating any of the rights of the plaintiff, tear up the line which he did build. It is reasonable to infer that one of the purposes of the ordinance was to put at rest the question of the sufficiency of the supply, and to forestall and prevent just such a controversy as has here arisen, by definitely providing that the waters of Mink Creek, which were admittedly sufficient for such needs as then existed or were likely to arise in the immediate future, should be made available and put at the service of the city. Moreover, in the light of experience, and of facts in the record, and of what other municipalities have been doing, such was the course dictated by prudence and reasonable foresight. It appears that the sources from which a gravity supply for the plaintiff can be procured are limited, and of these the streams hereinbefore named are the most desirable. Under the system of water appropriation which prevails in this State, rights of private individuals might be initiated and become vested in the waters of Mink Creek at any time. The city's present and future

interests therefore demanded that any claim which the defendant at that time had the right to make or to initiate, to the waters of Mink Creek, should be perfected and protected by the construction of the requisite means for the diversion and application of the water to a beneficial use. It was competent for the city to contract for such protection, and its desire so to do, it is reasonable to presume, was one of the moving considerations for submitting to the conditions imposed upon it by the ordinance. The contention that it would have been against public policy for the defendant to have appropriated more of the public waters than was necessary to supply the immediate needs of the city, and that therefore the construction of a larger conduit would have been a vain thing, is without merit. Under the law of the State an appropriator has a reasonable time to apply the water which he has appropriated, to a beneficial use, and if such rule may be invoked in the case of an appropriation for agricultural purposes it should, and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality. Besides, if not required for the immediate necessities of the city, the appropriation could have been consummated and the right held intact by a temporary application of any surplus to other beneficial uses. Upon this branch of the case the conclusion is unavoidable that the defendant's failure to bring in and make available for the uses of the plaintiff the waters of Mink Creek constitutes a substantial breach of his contract."

Aside from the situation as disclosed by the evidence and prior ordinances, it would seem that the terms of the ordinance speak for themselves.

Other Reasons For Cancellling Franchise Alleged in Bill of Complaint.

While it is true that in paragraph 9 of the bill of complaint (folios 3 and 4, Tr.), the charge is made that defendant has failed to live up to his contract by bringing in the waters of Mink Creek as he agreed to do, yet there are other charges made, and in paragraph 10 (folios 4 and 5, Tr.), the following charges are made:

- (a) That the water supply is insufficient.
- (b) That Murray has promulgated unreasonable rules.
- (c) That at various times of the year the people of Pocatello have not had sufficient water to sprinkle the streets of the city, and for culinary and domestic uses and for fire purposes.
- (d) That particularly during the summer of 1911 the reservoirs became dry.

In paragraph 11 (folio 6, Tr.), it is charged that defendant has placed reducers in the service pipes of the users of water from the system, and has thereby caused the water users great annoyance and inconvenience. In paragraph 13, it is charged that the manager of this company is pursuing a policy of ill-will and malice towards the inhabitants of the city.

Insufficiency of Water Supply.

During the summer of 1911 the total flow of Gibson Jack and Cusick Creeks supplemented by the water brought in from Mink Creek, amounted to 2.56 second

feet. The testimony of W. P. Havenor in this regard (folio 143, Tr.), is as follows:

“On August 21, 1911, I measured the amount of water flowing in Mink Creek, above the intake of the company, and found 3.2 second feet.

On August 22, 1911, I measured the water being discharged from the Mink Creek pipe line into the flume above the Gibson Jack intake and found .46 of a second foot.

This pipe line is the only means of conveying water into the water system of the company. On August 22, 1911, I measured the water flowing in Gibson Jack Creek and determined the quantity to be 1.63 second feet. On the 7th of September, 1911, I measured the water flowing in Cusick Creek and found .13 of a second foot. All these measurements were taken above the intakes of the company's pipe lines. On Gibson Jack Creek it was taken 183 feet above the intake. There was no water coming into the creek between the point of measurement and the intake in any case.”

W. E. Moore testified (folio 111, Tr.), as follows:

“I found 3.16 cubic second feet there (Mink Creek) going to waste. I measured the water in the flume at Gibson Jack Creek and carried from Mink Creek, and it was .46 of a second foot. I have figured the capacity of the pipe line leading from Mink Creek to Gibson Jack at .71 of a second foot. This is the maximum amount this pipe would carry. I would say that my measurement of .46 second feet carried in the pipe was correct within 10 per cent. I think the pipe was that day carrying close to its capacity under conditions surrounding it at that time. I made measurements again on September 14, 1911,

and found running in the pipe from Mink Creek to Gibson Jack .56 second feet. This was correct within one per cent. The day before I was at Mink Creek and found 3.57 of a second foot running.”

William A. Ashton testified (folio 117, Tr.), as follows:

“I am fifty-three years of age; live at Salt Lake City, and am a civil engineer. Have been engaged in engineering for thirty years and have had occasion several times to measure water. Was at one time chief engineer for the Oregon Short Line and am now chief engineer for the Utah Railroad Company. On September 15th, with other parties, I measured the water flowing in Mink Creek above the intake of the Pocatello Water Company’s pipe. One measurement showed 3.5 second feet, another 3.7 second feet. Practically all the water at that time was passing by the intake and down the stream. There might have been a little diverted into the pipe. We couldn’t get right to the pipe as the valve-house was locked. On the same day we went to Gibson Jack and took two measurements. One with a weir, then opened the spill pipe and measured the water passing through that with a box. The first showed .52 second feet and the other .56 second feet. The box measurement was very close, the weir measurement might have fluctuated a little. We measured the water flowing in Cusick Creek by a dam and box holding one cubic foot and found the flow to be .05 of a second foot. We measured the flow in Gibson Jack Creek above the intake of the Pocatello Water Company’s pipe line by means of a weir above the dam, the head of the pipe line, and found 1.73 second feet. A box measurement showed 1.95 second feet. Knowing the different elevations, size and conditions of the pipe, one could figure its carrying capacity approximately.”

Upon this evidence the judge of the trial court found that the amount of water brought by the defendant from Mink Creek and commingled with the waters of Gibson Jack Creek to be .56 of a second foot (folio 87, page 100, Tr.), and found in addition to that that the total flow of Gibson Jack and Cusick Creeks supplemented by the water brought from Mink Creek, amounted to about 2.56 second feet (folio 88, Tr.). The evidence is undisputed that there was during 1912, irrigated from this water supply, lawns and gardens amounting in all to 103 acres (folio 135, Tr.), and under the terms of Ordinance No. 86, the city of Pocatello is entitled to use 4,000 gallons of water per day for each fire hydrant, which would amount to 224,000 gallons per day for that purpose. During the excessively dry and hot season of the year, the amount of water furnished to the reservoirs would not be much in excess of the necessary amount to irrigate this 103 acres and furnish the 224,000 gallons to the city for fire purposes, street sprinkling, etc., when the fact is taken into consideration that a very considerable amount of this water is lost in the system and does not reach the consumer, as it must be understood in connection with this matter that this 2.5 second feet is the amount delivered at the reservoirs and not the amount delivered to consumers, no allowance is made for waste in the system itself, which the San Francisco expert said in his experience had run up to as high as 50 per cent. but even assuming that the waste in the system itself does not amount to so much, there would still be a sufficient loss so that we would probably be entirely safe in saying that less than two second feet is actually being delivered to the city of more than 10,000 people for all purposes. The evidence in this case shows that for many

years there has been a shortage in the water supply in the city of Pocatello and the testimony of experts cannot alter the fact that the lawns of citizens have dried up and burned during the hot season, nearly every year for many years, and in addition to that there have been many times when the city has been entirely without fire protection and has not had any water to sprinkle the streets. These matters are very serious, and it seems to us would entirely justify the court in cancelling this franchise irrespective of the terms of the contract. The record in this case shows a long continued abuse of the plaintiff's franchise and the facts constituting this abuse are so clearly set forth in the opinion of the trial court and the transcript that we feel we should not file a voluminous brief setting forth the evidence in detail, as it appears quite clearly in the transcript, which in this case is not lengthy. We desire to quote in our brief and adopt as a part of this argument, some passages from the opinion of the trial court (folios 90, 91 and 92, Tr., pages 103, 104 and 105), as follows:

“Other factors necessarily entering into the calculation of the sufficiency of the supply are left in equal uncertainty. If the contrary were not here conclusively shown, it would be reasonable to presume the existence of a standard of usual consumption of water per capita approved by experience, at least for ordinary domestic and municipal purposes, and exclusive of use for lawns and gardens, but the published data disclose the most astonishing diversity, and admittedly is no recognized standard. As to the amount required for lawns, gardens and trees, there is apparently no recorded experience at all, and except in so far as such use may be found analogous to the irrigation of agricultural lands the ques-

tion is left almost entirely to conjecture. Definite and credible information is furnished touching the area of lawns and gardens watered from the defendant's system, but the testimony is strikingly conflicting as to the number of people who depend upon it for domestic uses. One fact is put beyond all peradventure: Justly or unjustly, the inhabitants of the city, with remarkable unanimity, entertain the view that during the summer season the water supply is radically deficient. The fact is established by overwhelming evidence, and even two of the three citizens called by defendant for the apparent purpose of establishing a different view, upon cross-examination reluctantly made admissions strongly tending to corroborate the witnesses for the plaintiff. It is abundantly shown that to a degree lawns frequently became parched and trees lose a part of their leaves in the middle of the summer; and that during certain years for a considerable period of time, the water has been entirely shut off from the city for several hours each day. To meet the apparent shortage, when it first began to be serious, the defendant, instead of enlarging the intake and bringing in the waters of Mink Creek as by his contract he was required to do, went to the expense of thoroughly equipping the system with what in the record are referred to as 'reducers,' a device by which the one-half inch opening from the main into the service pipe of each consumer was reduced to one-fourth of an inch, and the two inch goosenecks from which water was delivered into the city sprinkling carts were reduced to about one-half of an inch. Conceding his inability at times to maintain the required pressure for fire protection, and that during the summer season there is a measure of inconvenience and suffering for want of sufficient water, the defendant asserts that the shortage is due to a waste-

ful use, apparently not by all of the citizens, but by a small percentage thereof. There is, however, no substantial evidence of abnormal waste. Some waste there is bound to be where there are so many consumers, even under a meter system, and it may be fairly assumed that where, as here, flat rates are charged, there is a much greater percentage of waste than where meters are used. Where economy in the application of water is unsupported by consideration of self-interest on the part of the consumers, the general tendency is, of course, toward liberality, if not extravagance, of use, and then there are always, in every community, people who, even to the injury of others, will waste when the waste is without cost to them. But the defendant having contracted for the flat rate system must be presumed to have contemplated such extravagance of use as is ordinarily and necessarily incident thereto. He agreed to furnish a sufficient supply of water under a system which he must have known is everywhere and always attended with a use less economical than where the charge is based upon the amount consumed. It must, therefore, be held that he anticipated that the more prodigal use would necessarily prevail, and assented thereto, and he cannot now be heard to say that he has fulfilled his contract obligation because, *while the amount supplied is insufficient under the system with respect to which the obligation was expressly assumed*, it might be sufficient under some other system. I am not to be understood as directly or indirectly sanctioning the wasteful use of water; that is to be deprecated, and, if persisted in, should not only be condemned but appropriately punished. But we must consider conditions as they are, and not as we would like to have them to be. Unfortunately, the flat rate system was contracted for, and neither party can make the

substitution of a better system without the consent of the other, and thus far negotiations to that end have been without result. While admittedly there is substantially no direct evidence of abnormal waste, it is contended that the implications from the testimony of hydraulic engineers called by the defendant are strongly to that effect. Incidentally it may be stated that testimony of a similar character adduced by the plaintiff strongly implies an insufficient supply. But it must be apparent that this so-called expert testimony, both of the plaintiff and the defendant, is of little weight. Admittedly there is no recognized standard of reasonable per capita consumption anywhere or under any conditions. It is also conceded that published experience of the amounts of water actually furnished to and consumed by municipalities fails to approach a reasonable degree of uniformity, and is therefore of little value. Indeed, it is not pretended by the witnesses for the defendant that their opinions upon the per capita amount reasonably required are based upon actual use; and generally speaking, their views seem not to be in harmony with such experience as is disclosed by the reported data. They simply state to us what in their opinion the consumption ought to be. So far as appears none of these witnesses ever made or observed any systematic tests or experiments whatsoever."

It is apparently admitted that there is a shortage of water in Pocatello and an insufficient supply and the excuse seems to be that some of the water users waste water which they would not do under the meter system, but as suggested by the court, if Ordinance No. 86 is to be looked to the flat rate was the one contracted for and the contract contemplated just such a use of water as was usual under the flat rate and not the meter rate,

and in the language of the lower court, defendant "*cannot now be heard to say that he has fulfilled his contract obligation because while the amount is insufficient under the system with respect to which the obligation was expressly assumed, it might be sufficient under some other system.*"

Conduct of Water Company.

As to the conduct of this water company, we desire to again adopt as a part of our argument and quote from the opinion of the trial court (folios 101, 102, and 103., Tr., pp. 116, 117 and 118):

"As we have already seen, the defendant some years ago reduced the apertures through which the water passes from the mains into the service pipes to a quarter of an inch. Now, consider that under the rules of 1912 the amount of water which, with a free flow, would pass through such a small opening was further cut down for lawn purposes by the requirement that, after suffering the loss of force or current necessarily due to friction in passing through the requisite length of hose, the water should be sprayed through a nozzle not to exceed one-fourth of an inch in diameter. Again, it was required that all sprinkling in the city must be done between the hours of six o'clock and eight thirty o'clock p. m., so that, owing to the limited size of the mains, when the great majority of consumers were using water at the same time, as under such a regulation was bound to be the case, the pressure was materially reduced, thus substantially diminishing the delivery into the service pipes. Add to these restrictions the most noteworthy provisions of the rules, and that which is thought to be especially objectionable.

namely, the requirement that 'the hose through which the water is supplied must be held in the hands of the operator while the sprinkling is being done,' and we have a set of conditions which are thought to be highly unreasonable. I do not mean to say that under no conditions could such a regulation be permissible. Doubtless water can be more effectively applied by holding the hose in the hand than by the employment of any of the many patented sprinkling devices designed for the saving of labor and made familiar to us by their common use, and if all available water were being supplied, and the amount were barely sufficient to meet the needs of all, when applied in the most economical manner, such a stringent rule would doubtless be warranted; but we are not here dealing with emergencies or famine conditions. Or, possibly, if the consumer had the privilege of applying the water at any hour of the day and were furnished with a stream of sufficient volume to enable him to water his lawn expeditiously, the restriction might be tolerated. Here two hours and a half per day are by the rules allowed to the householder for watering his lawn. Presumably for the larger lawns at least all of this time is required, but if we assume that it requires upon the average only an hour and a half each day, an enormous amount of time in the aggregate is necessarily consumed. Now it is obvious that if the citizen could draw three times the volume of water, he could do the required work in one-third of the time, and if the defendant is to be permitted to insist upon the highest possible efficiency for the water he furnished, surely he must furnish it under conditions making its efficient application reasonably practicable; if he would benefit by rigid economy of use he should share in the burdens necessarily incident thereto. According to the testimony

of one of the defendant's employees, water is furnished for approximately eight hundred and fifty lawns, each embracing one or more lots. Assuming that it requires upon the average an hour and a half a day to water a lawn, it follows that each day while these rules are in force the inhabitants of the plaintiff city contribute the equivalent of 1275 hours of time for one man, to the conservation of water, or the whole time of more than 150 men, working continuously for eight hours each day, or estimating such labor to be worth 25 cents an hour, the equivalent of \$318.75 per day, or over \$18,000.00 for a period of two months, which, upon a basis of six per cent, would cover the annual interest upon an investment of more than \$300,000.00. Clearly the necessity for such a waste of time would not exist if the defendant would bring in the available supply of water in Mink Creek, and would in part be obviated if the conduits by which the present supply is brought in and distributed, were of a sufficient capacity to enable consumers more quickly to procure and apply the amounts to which admittedly they are severally entitled."

Failure to Extend Street Mains.

There is much evidence in the record showing that this water company has refused to extend street mains and has compelled the citizens desiring to use its water to construct at their own expense the necessary mains. There is much evidence also showing the flagrant disregard which the manager of this company has had for the rights of the people. Some of the Exhibits in this case are interesting, particularly the letter written to Mayor Cleare (Exhibit 10, Folios 321 to 340). In this

letter defendant said at Folio 338, that the waters of Mink Creek would be brought in, and this was on July 20, 1905. The opinion of the trial court has so thoroughly presented the matters involved that it leaves very little to be said by us in defense of the decree below.

A Reply to Certain Matters in Appellant's Brief.

On page 10 of the brief of appellant is a heading (a), which reads as follows:

“There is nothing in Ordinance No. 86 which requires Murray to supply water sufficient for the needs of the city and its inhabitants.”

May we be permitted to inquire of counsel what they think the city received as a consideration for the passage of Ordinance No. 86? They say the ordinance did not bind them to bring in *the waters of Mink Creek*, and they now say it did not even bind them to furnish a *sufficient supply*. In other words, they seem to argue that the obligations of this contract are all on one side. It is quite apparent that the conditions are extremely burdensome upon the city, but counsel go happily along and agree “quite so” and then quite innocently assert “but we are bound to do nothing at all;” such a condition seems to be directly opposed to the most elementary principles of the law of contracts, one of which is that there must be a consideration for every contract. The recital in the preamble of Ordinance No. 86 referred to in the brief of appellant, is, when taken in connection with Section 6 of Ordinance No. 86, perfectly plain and there does not appear to be any reasonable ground for

quibble about it, either the defendant agreed to bring in the waters of Mink Creek as recited in the preamble or he agreed to nothing at all.

And then counsel say, that at the time Ordinance No. 86 was passed the water supply was *not inadequate*. We reply by saying that whether it was or not, the defendant procured his contract on the assumption and agreement of both parties thereto that the water supply was at that time *inadequate*, and does it now lie in his mouth to make the statement that the statement was untrue and the supply was adequate, and yet say the contract binds the city? The argument of counsel is certainly peculiar, to say the least.

Counsel then say, to have brought in all the waters of Mink Creek would have *doubled* the rates to the consumers. We don't think so. *Ordinance No. 86 fixes* the rates on the assumption and agreement that these waters would be brought in, yet defendant charges us the rates but does not bring in the water and now says if he had brought in the water he would have been compelled to charge more. *What an argument!*

Counsel say, sufficiency of water supply is not an issue in this case. We say directly opposite is true, but whether it is or not the franchise should be cancelled because it has been violated in every particular by the defendant. The record contains abundant evidence that the city for many years has insisted upon a performance of this contract. All that we request is that the entire evidence be read and we insist that it must convince

that the people of Pocatello have been greatly wronged by the defendant and have borne their wrongs with an astonishing amount of forbearance.

Public Utilities Commission.

The suggestion contained in appellant's brief that the city in this case should be referred to the Public Utilities Commission for relief is little short of *absurd*. The utilities commission must take the franchises of this water company as it finds them and to refer the city to that commission bound, and with its hands tied by the unconscionable provisions of a contract which has been violated by the defendant and for which the city has never at any time received any consideration whatever, is to give us a "stone" when we ask for "bread." There is no merit whatever in the suggestion.

Number of Water Users.

The per capita consumption as given by so-called experts is always given by using as a basis the population including every man, woman and child within the city limits. Counsel seem to contend that it should be estimated by counting the water users, but this contention is incorrect. Besides, it is perfectly absurd to say that there are only 5000 people using water from this system when the population of the city is more than 10,000, and this is the only means of domestic supply except a few wells in portions of the town not covered by the present system. Other assignments of error are not argued

or referred to in the brief of appellant, so we do not argue them here.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

D. WORTH CLARK,

J. R. S. BUDGE,

W. H. WITTY,

Attorneys for Plaintiff and Appellee.

Residence, Pocatello, Idaho.

United States
Circuit Court of Appeals

For the Ninth Circuit.

PERRIS IRRIGATION DISTRICT, a Corpora-
tion,

Plaintiff in Error,

VS.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,

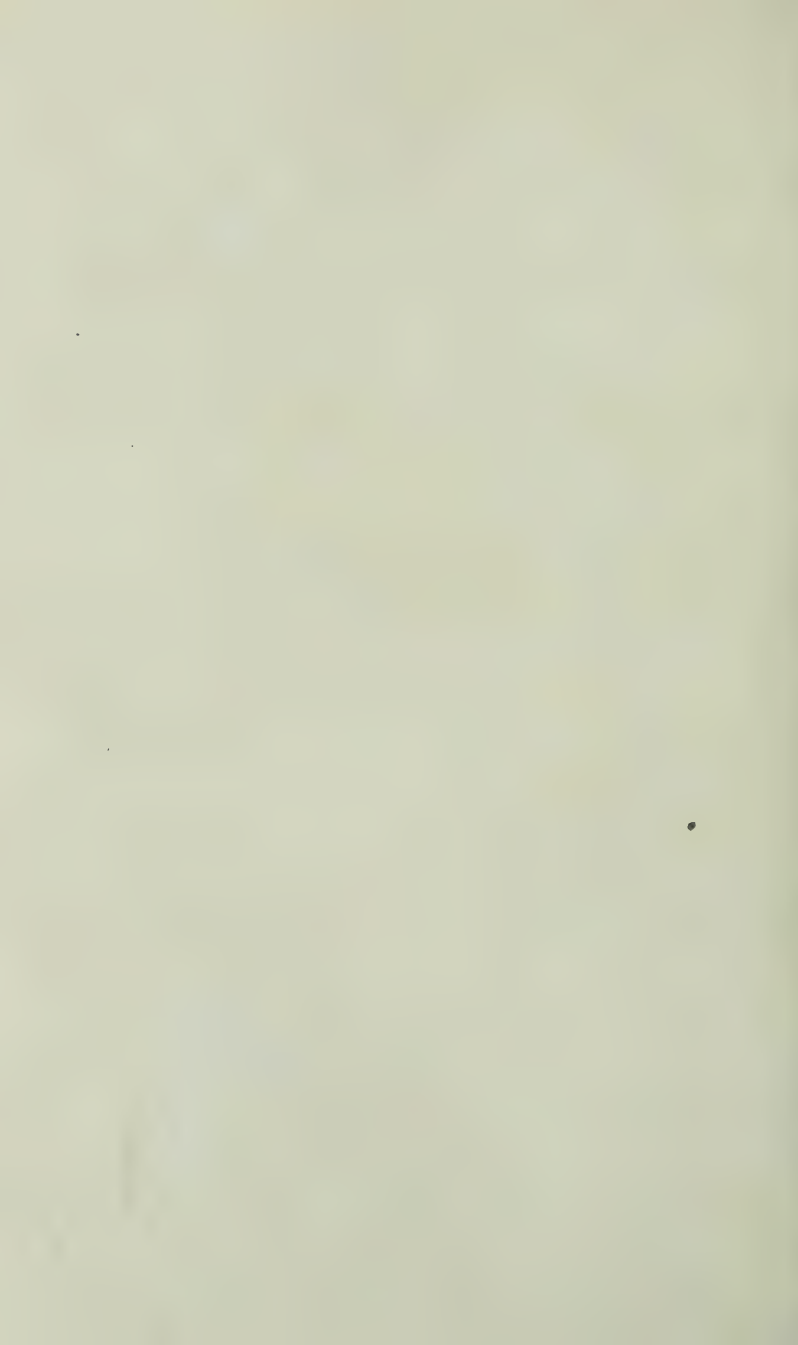
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

FILED

JUL 28 1914



United States
Circuit Court of Appeals

For the Ninth Circuit.

PERRIS IRRIGATION DISTRICT, a Corporation,

Plaintiff in Error,

vs.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of A. R. Frederick in Support of Motion to Set Aside Summons.....	47
Affidavit of Edith C. Frederick in Support of Motion to Set Aside Service of Summons..	45
Affidavit of H. M. Harford in Support of Motion to Set Aside Summons.....	49
Affidavit of K. D. Harger in Support of Motion to Set Aside Summons.....	50
Affidavit of William M. Hiatt.....	60
Affidavit of Oscar C. Mueller, Dated July 12, 1912.....	63
Affidavit of Oscar C. Mueller, Dated July 20, 1912.....	57
Affidavit of George M. Pearson on Motion to Change Place of Trial in Cullen vs. Perris Irrigation District	76
Affidavit of W. H. Pilch to Answer in Leeman vs. Perris Irrigation District.....	79
Affidavit of W. H. Pilch on Motion to Change Place of Trial in Cullen vs. Perris Irrigation District	74

Index.	Page
Affidavit of George H. Sawyer in Support of Motion to Set Aside Summons.....	48
Amended Complaint	18
Amended Praecipe for Transcript of Record...	97
Amended Return of Service of Complaint and Summons	35
Assignment of Errors	85
Attorneys of Record, Names and Addresses of.	1
Certificate of Clerk U. S. District Court to Judgment-roll	39
Certificate of Clerk U. S. District Court to Tran- script of Record.....	98
Citation on Writ of Error (Copy).....	94
Citation on Writ of Error (Original).....	4
Complaint	6
Conclusions of the Court on Defendant's Motion to Quash and Dismiss.....	81
Default	36
EXHIBITS:	
Exhibit "A" to Affidavit of Oscar C. Mueller—Summons in Cullen vs. Per- ris Irrigation District.....	65
Exhibit "B" to Affidavit of Oscar C. Mueller—Notice of Motion and Motion to Change Place of Trial in Cullen vs. Perris Irrigation District.....	68
Exhibit "C" to Affidavit of Oscar C. Mueller—Affidavit to Answer in Lee- man vs. Perris Irrigation District, etc..	78
Judgment	37
Motion for Order Dismissing Action.....	55

Index.

Page

Motion to Change Place of Trial.....	72
Motion to Set Aside Service of Summons.....	43
Names and Addresses of Attorneys of Record..	1
Notice of Motion for Order Dismissing Action.	53
Notice of Motion for Order Setting Aside Judgment.....	83
Notice of Motion to Set Aside Service of Summons.....	41
Order Denying Motion to Dismiss Judgment..	84
Order Denying Motion to Quash Service of Summons and Motion to Dismiss Cause, etc.....	80
Order Enlarging Time to November 1, 1913, to File Record Thereof and to Docket Cause..	100
Order Enlarging Time to January 1, 1914, to File Record Thereof and to Docket Cause..	101
Order Granting Writ of Error.....	93
Petition for Writ of Error.....	91
Praecipe to Enter Default.....	40
Summons	31
Writ of Error (Original).....	2

Names and Addresses of Attorneys.

For Plaintiff in Error:

LEWIS R. WORKS, Esq., 821 H. W. Hellman
Building, Los Angeles, California.

C. HUGHES JORDAN, Esq., 821 H. W. Hell-
man Building, Los Angeles, California.

FRANK W. STAFFORD, Esq., 821 H. W.
Hellman Building, Los Angeles, California.

For Defendants in Error:

OSCAR C. MUELLER, Esq., 404-52-4-6 Wil-
cox Building, 206 South Spring Street, Los
Angeles, California. [4*]

WILLIAM M. HIATT, Esq., 404-52-4-6 Wil-
cox Building, 206 South Spring Street,
Los Angeles, California.

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

*Page-number appearing at foot of page of original certified Record.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Honorable Judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you, between PERRIS IRRIGATION DISTRICT, plaintiff in error, and ESCHER & RAHN, defendants in error, a manifest error has happened to the damage of Perris Irrigation District, plaintiff in error, as by complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then [5] and there held, and that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 15th day of August, 1913.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

Allowed this, the 16th day of August, 1913.

OLIN WELLBORN,
United States District Judge.

I hereby certify that a copy of the within Writ of Error was on the 16th day of August, 1913, lodged in the Clerk's office of the said United States District Court, for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy. [6]

[Endorsed]: No. 1226—Law. In the District Court of the United States, in and for the Southern District of California, Ninth Circuit, Southern Division. Conrad Escher & Louis Rahn, Copartners Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Writ of Error. Filed, Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Citation [on Writ of Error (Original)].

United States of America, to Conrad Escher and
Louis Rahn, Copartners Doing Business as
Escher & Rahn, and to Oscar Mueller and Will-
iam M. Hiatt, Their Attorneys:

YOU ARE HEREBY NOTIFIED, That in a cer-
tain action at law in the United States District Court
in and for the Southern District of California,
wherein Conrad Escher and Louis Rahn, copartners
doing business as Escher & Rahn, are plaintiffs, and
Perris Irrigation District is defendant, a writ of
error has been allowed on the petition of the Perris
Irrigation District, defendant therein, to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit. You are hereby cited and admonished to be
and appear in said court at San Francisco, 30 days
after the date of this citation, to show cause, if any
there be, why the judgment and order appealed from
should not be corrected, and speedy justice done the
parties in that behalf.

WITNESS, The Honorable OLIN WELLBORN,
Judge of the United States District Court for the
Southern District of California, this 16th day of
August, A. D. 1913.

OLIN WELLBORN,
United States District Judge. [8]

[Endorsed]: No. 1226—Law. In the District
Court of the United States, Ninth Circuit, Southern
District of California, Southern Division. Conrad
Escher and Louis Rahn, Copartners, Doing Business
as Escher & Rahn, Plaintiffs, vs. Perris Irrigation
District, Defendant. Citation. Received Copy of
Within Citation. Aug. 18, '13. Oscar C. Mueller,
Wm. M. Hiatt. Filed Aug. 18, 1913. Wm. M. Van
Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[9]

*In the District Court of the United States of
America, in and for the Southern District of
California.*

C. C. No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

THE PERRIS IRRIGATION DISTRICT (a Cor-
poration),

Defendant [10]

*In the United States Circuit Court, Ninth Circuit,
Southern District of California, Southern Division.*

JOHN ESCHER and WILLIAM RAHN, Copart-
ners, Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Complaint.

Now come the plaintiffs and complaining of the defendant, for cause of action allege:

FIRST COUNT.

I.

That the plaintiffs are and at all the times herein named were copartners, doing business under the firm name and style of Escher & Rahn, and that each of them is a citizen of the Republic of Switzerland.

II.

That said defendant is, and at all the times herein-after mentioned, was, an irrigation district organized, incorporated, and existing under and by virtue of an act of the Legislature of the State of California, entitled, "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the

State of California, amendatory and supplemental to said act, and said irrigation district is wholly situated in the County of Riverside, State of California [11]

III.

That said irrigation district, at the time it was organized and incorporated, was wholly situated in the Counties of San Diego and San Bernardino, State of California, but that subsequent to its said incorporation, to wit, on March 11th, 1893, and subsequent to the issuance of its bonds, the County of Riverside in said State was created, and that said district thereafter was and now is wholly within the boundaries of said Riverside County.

IV.

That said defendant Perris Irrigation District, under and pursuant to the said act of the Legislature of the State of California, approved March 7th, 1887, and by its board of directors and officers thereunto duly authorized, issued a bond of said irrigation district, which was and is in the words and figures following:

Bond No. 76.

United States of America.

State of California.

\$500.

\$500.

Bond of

THE PERRIS IRRIGATION DISTRICT.

Total Issue: \$442,000.

Located in San Diego and San Bernardino Counties,
Cal.

For value received The Perris Irrigation District,
a public corporation, duly organized and existing un-

der and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of (\$500) five hundred dollars, in gold coin of the United States, at the dates and upon the installments as follows: At the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date, seven (7) per cent of said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date ten (10) per cent of said sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years from date, fifteen (15) per cent of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons [12] hereto attached. And said district promises to pay interest on the said principal at the rate of (6) six per cent per annum, payable in gold coin of the United States, at the office of the treasurer of said district semi-annually on the first day of January and July of each year, upon the surrender of the respective interest coupons thereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in

the aggregate to four hundred and forty-two thousand dollars caused to be issued by the board of directors of said Perris Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 1st day of November, 1890. The said series, of which this bond is one, is composed of eight hundred and eighty-four bonds, each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of an act of the Legislature of the State of California, entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7th, 1887.

All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon real property of the district, which tax is, and the said bonds are, by said act of the Legislature, made a lien upon all said real property.

In witness whereof said Perris Irrigation District has caused these bonds to be issued and signed by its president and secretary, and its corporate seal to be hereunto affixed and the lithographed signature of its secretary to be affixed to each of said coupons at the office of the board of directors in said district,

this 1st day of January, A. D. 1891.

[Corporate Seal]

PERRIS IRRIGATION DISTRICT,

By J. W. NANCE,

President of said Board.

By H. A. PLIMPTON,

Secretary of said Board.

[Endorsed]: No. 76. Bond of the Perris Irrigation District. \$500. Dated, January 1st, A. D. 1891. Interest, 6 per cent per annum. Payable January 1st and July 1st.

V.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain coupon No. 22, which said coupon was and is in the words and figures following, to wit:

\$15.00. Interest Coupon No. 22.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer of said district in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of fifteen dollars in United States gold coin, being [13] semi-annual interest on bond.

No. 76.

H. A. PLIMPTON,

Secretary.

VI.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the president of the said board of directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond

were and are the signatures of the said J. W. Nance and H. A. Plimpton in their said respective capacities, and the signature to said coupon is and was the signature of said H. A. Plimpton, secretary as aforesaid.

VII.

That subsequent to the issuance of said bond, and prior to the commencement of this action, these plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the coupons thereto attached, including said coupon No. 22, and said plaintiffs ever since have been and now are the owners and holders of said bond and all coupons thereto attached.

VIII.

That said coupon No. 22 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiffs on said coupon the sum of \$15.00, with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

SECOND COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege: [14]

I.

That the plaintiffs are and at all the times herein named were copartners, doing business under the firm name and style of Escher and Rahn, and that each of them is a citizen of the Republic of Switzerland.

II.

That said defendant Perris Irrigation District is, and at all the times herein mentioned was, an irrigation district, organized, incorporated and existing under and by virtue of an act of the Legislature of the State of California, entitled, "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory and supplemental to said act, and said irrigation district is wholly situated in the County of Riverside, State of California.

III.

That heretofore, to wit, on or about the 1st day of January, A. D. 1891, the said Perris Irrigation District, under and pursuant to the said act of the legislature of the State of California, approved March 7, 1887, and by its board of directors and officers thereunto duly authorized, issued certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the numbers thereof, and which said bonds were respectively numbered as follows, to wit: 77 to 87, both inclusive; 90 to 96, both inclusive; 277; 279 to 289, both inclusive; 292 to 295, both inclusive; 299 to 303, both inclusive; 305 to 354, both inclusive; 389 to 400, both inclusive; 406 to 415, both inclusive; 644; 645; 678 to 680, both inclusive; 681. [15]

IV.

That there were attached to the aforesaid bonds at the time of their issuance, certain interest bearing coupons, each of which was of the same tenor and effect and made and executed in the same form and manner as the coupon specifically described in the first count of this complaint, differing only in the numbers thereof, date of maturity and amount of payment; that of said coupons all those hereinafter specifically described were by the terms thereof payable prior to the commencement of this action and subsequent to January 1st, 1902; that one hundred and seventeen of said coupons, in addition to the coupon specifically described in the first count of this complaint, were at the time of the issuance thereof attached to the aforesaid designated bonds as follows, to wit, to each of said bonds were attached one of said coupons numbered 22, and that one hundred and eighteen of said coupons were at the time of the issuance thereof attached to the aforesaid designated bonds as follows, to wit, to each of said bonds was attached one of said coupons numbered 23, and that said coupons numbered 23 were in the same words and figures as the above described coupons numbered 22, except as to the number thereof, date of maturity and amount of payment, the amount of said payment being \$14.25, and date of maturity being July 1st, 1902.

V.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary

course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid two hundred and thirty-five coupons, in addition to the coupon hereinbefore specifically set forth in the first count of this complaint, and ever since have been and [16] now are the owners and holders of all said coupons.

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said two hundred and thirty-five coupons the sum of \$3,436.50, with interest thereon at the rate of seven per cent per annum from the date when each of said coupons respectively fell due.

THIRD COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof Paragraphs I, II, III and IV of the first count herein contained; and further allege:

II.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain installment coupon, being for the payment of a portion of the principal thereof, which said coupon was and is in the words and figures following, to wit:

\$25.00. Installment Coupon No. 1.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer

of said district in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of twenty-five dollars in United States gold coin, being the first installment of principal on Bond No. 76 of said district. Interest will cease after maturity.

H. A. PLIMPTON,
Secretary.

Dated January 1st, 1891. [17]

III.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the president of the said board of directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their said respective capacities, and the signature to said coupon is and was the signature of said H. A. Plimpton, secretary as aforesaid.

IV.

That subsequent to the issuance of said bond, and prior to the commencement of this action, the plaintiffs, did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the installment coupon thereto attached numbered 1, and said plaintiffs ever since have been and now are the owners and holders of said bond and the installment coupon thereto attached.

V.

That said coupon No. 1 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiffs on said installment coupon the sum of \$25, with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

FOURTH COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof Paragraphs I, II and III of the second count herein contained, and further [18] allege.

II.

That there was attached to each of the aforesaid bonds, at the time of their issuance, an installment coupon of the same number, tenor and effect, and made and executed in the same form and manner as the coupon specifically described in the third count of this complaint; that all of said coupons were, by their terms, payable prior to the commencement of this action, and subsequent to January 1st, 1902.

III.

That subsequent to the issuance of said bonds and installment coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid one hundred and seventeen installment coupons, in addition to the coupon hereinbefore specifically set forth in the third count of this

complaint, and ever since have been and now are the owners and holders of all said installment coupons.

IV.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said one hundred and seventeen installment coupons the sum of \$2,925.00, with interest thereon at the rate of seven per cent per annum from the date when each of said installment coupons respectively fell due.

WHEREFORE, plaintiffs pray judgment against said defendant in the sum of \$6,401.50, together with interest as aforesaid, and for costs of suit.

C. C. WRIGHT,

Attorney for Plaintiffs. [19]

State of California,

County of Los Angeles,—ss.

C. C. Wright, being first duly sworn, deposes and says: I am the attorney for the plaintiffs in the above-entitled cause and make this verification in their behalf. That said plaintiffs are without the City of Los Angeles and State of California, to wit, in the Republic of Switzerland. I reside and have my office in the said city of Los Angeles, California, wherefore I make this verification.

I have read the complaint herein and know the contents thereof; the same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

C. C. WRIGHT.

Subscribed and sworn to before me this 27th day of December, 1905.

[Seal]

CORA MAPLE,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. John Escher and William Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Complaint. Filed Dec. 28, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. C. C. Wright, Rooms 354-6-8 Wilcox Building, Los Angeles, Cal., Solicitor for Plaintiffs. [20]

*In the United States Circuit Court, Ninth Circuit,
Southern District of California, Southern
Division.*

CONRAD ESCHER and LOUIS RAHN, Copartners, Doing Business as ESCHER & RAHN (Erroneously Suing Herein as JOHN ESCHER and WILLIAM RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Amended Complaint.

Now come the plaintiffs and file this, their Amended Complaint, and for cause of action allege:

I.

That the plaintiffs are, and at all the times herein named were, copartners doing business under the firm name and style of Escher & Rahn, and that each of them is a citizen of the Republic of Switzerland, and that their true names are Conrad Escher and Louis Rahn, and not John Escher and William Rahn, as alleged in the original complaint on file herein.

II.

That said defendant is, and at all the times hereinafter mentioned was, an irrigation district organized, incorporated and existing under and by virtue of an Act of the Legislature of the State of California, entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory and supplemental to [21] said act, and said irrigation district is wholly situated in the County of Riverside, State of California.

III.

That said irrigation district, at the time it was organized and incorporated, was wholly situated in the counties of San Diego and San Bernardino, State of California, but that subsequent to its said incorporation, to wit, on March 11th, 1893, and subsequent to the issuance of its bonds, the County of Riverside in said State was created, and that said district thereafter was and now is wholly within the boundaries of said Riverside County.

IV.

That said defendant Perris Irrigation District, under and pursuant to the said act of the Legislature of the State of California, approved March 7, 1887, and by its Board of Directors and officers thereunto duly authorized, issued a bond of said irrigation district, which was and is in the words and figures following:

Bond No. 76.

United States of America.

State of California.

\$500.

\$500.

Bond of

THE PERRIS IRRIGATION DISTRICT.

Total Issue: \$442,000.

Located in San Diego and San Bernardino Counties,
Cal.

For value received The Perris Irrigation District, a public corporation, duly organized and existing under and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of (\$500) five hundred dollars, in gold coin of the United States, at the dates and upon the installments as follows: At the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date, seven (7) per cent of said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date, ten (10) per cent of said

sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years from date, fifteen (15) per cent of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons hereto attached. And said district promises to pay interest on the [22] said principal at the rate of (6) per cent per annum, payable in gold coin of the United States, at the office of the treasurer of said district semi-annually on the first day of January and July of each year, upon the surrender of the respective interest coupons thereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in the aggregate to four hundred and forty-two thousand dollars caused to be issued by the board of directors of said Perris Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 1st day of November, 1890. The said series of which this bond is one, is composed of eight hundred and eighty-four bonds, each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of an act of the Legislature of the State of California, entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other

property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887.

All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon real property of the district, which tax is, and the said bonds are, by said act of the Legislature, made a lien upon all said real property.

In witness whereof, said Perris Irrigation District has caused these bonds to be issued and signed by its president and the lithographed signature of its secretary to be affixed to each of said coupons at the office of the board of directors in said district, this 1st day of January, A. D. 1891.

[Corporate Seal]

PERRIS IRRIGATION DISTRICT.

By J. W. NANCE,

President of said Board.

By H. A. PLIMPTON,

Secretary of said Board.

[Endorsed]: No. 76. Bond of the Perris Irrigation District. \$500. Dated January 1st, A. D. 1891. Interest, 6 per cent per annum. Payable January 1st and July 1st.

V.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain coupon No. 22, which said coupon was and is in the words and figures following, to wit:

\$15.00. Interest Coupon No. 22.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer

of said district in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of fifteen dollars in United States gold coin, being semi-annual interest on bond.

No. 76.

H. A. PLIMPTON,
Secretary.

VI.

That at the time of the issuance of said bond and coupon [23] thereto attached, J. W. Nance was the president of the said Board of Directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their said respective capacities, and the signature to said coupon is and was the signature of said H. A. Plimpton, secretary as aforesaid.

VII.

That subsequent to the issuance of said bond, and prior to the commencement of this action, these plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond, and also the coupons thereto, attached, including coupon No. 22, and said plaintiffs ever since have been and now are the owners and holders of said bond and all coupons thereto attached.

VIII.

That said coupon No. 22 has not been paid, nor has any part thereof been paid; that there is now

due, owing and unpaid to the plaintiffs on said coupon the sum of \$15.00, with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

SECOND COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

That the plaintiffs are copartners, doing business under the firm name and style of Escher & Rahn, and that each of them is a citizen of the Republic of Switzerland.

II.

That said defendant Perris Irrigation District is, and at all the times herein mentioned was, an irrigation district, organized, [24] incorporated and existing under and by virtue of an act of the Legislature of the State of California, entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory and supplemental to said act, and said irrigation district is wholly situated in the County of Riverside, State of California.

III.

That heretofore, to wit, on or about the 1st day of January, A. D. 1891, the said Perris Irrigation District, under and pursuant to the said Act of the Legislature of the State of California, approved March 7,

1887, and by its board of directors and officers thereunto duly authorized, issued certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the numbers thereof, and which said bonds were respectively numbered as follows, to wit, 77 to 87, both inclusive; 90 to 96, both inclusive; 277; 279 to 289, both inclusive; 292 to 295, both inclusive; 299 to 303, both inclusive; 305 to 354, both inclusive; 389 to 400, both inclusive; 406 to 415, both inclusive; 644; 645; 678 to 680, both inclusive; 681.

VI.

That there were attached to the aforesaid bonds at the time of their issuance, certain interest-bearing coupons, each of which was of the same tenor and effect and made and executed in the same form and manner as the coupon specifically described in the first count of this complaint, differing only in the numbers thereof, date of maturity and amount of payment; that of said coupons all [25] those hereinafter specifically described were by the terms thereof payable prior to the commencement of this action and subsequent to January 1st, 1902; that one hundred and seventeen of said coupons, in addition to the coupon specifically described in the first count of this complaint, were at the time of the issuance thereof attached to the aforesaid designated bonds as follows, to wit, to each of said bonds were attached one of said coupons numbered 22, and that one hundred and eighteen of said coupons were at the time of the issuance thereof attached to the afore-

said designated bonds as follows, to wit, to each of said bonds was attached one of said coupons numbered 23, and that said coupons numbered 23 were in the same words and figures as the above-described coupons numbered 22, except as to the number thereof, date of maturity and amount of payment, the amount of said payment being \$14.25, and date of maturity being July 1st, 1902.

V.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid two hundred and thirty-five coupons, in addition to the coupon hereinbefore specifically set forth in the first count of this complaint, and ever since have been and now are the owners and holders of all said coupons.

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said two hundred and thirty-five coupons the sum of \$3,436.50, with interest thereon at the rate of seven per cent per annum from the date when each of said coupons respectively fell due. [26]

THIRD COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof paragraphs I, II, III and IV of the first count herein contained; and further allege:

II.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain installment coupon, being for the payment of a portion of the principal thereof, which said coupon was and is in the words and figures following, to wit:

\$25.00. Installment Coupon No. 1.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer of said district, in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of twenty-five dollars in United States gold coin, being the first installment of principal on Bond No. 76 of said district. Interest will cease after maturity.

H. A. PLIMPTON,

Secretary.

Dated January 1st, 1891.

III.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the president of the said board of directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their respective capacities, and the signature to said coupon is and was the sig-

nature of said H. A. Plimpton, secretary as aforesaid.

IV

That subsequent to the issuance of said bond, and prior to the commencement of this action, the plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the installment coupon thereto attached numbered 1, and said plaintiffs ever since [27] have been and now are the owners and holders of said bond and the installment coupon thereto attached.

V.

That said coupon No. 1 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiffs on said installment coupon the sum of \$25; with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

FOURTH COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof Paragraphs I, II and III of the second count herein contained, and further allege:

II.

That there was attached to each of the aforesaid bonds, at the time of their issuance, an installment coupon of the same number, tenor and effect, and made and executed in the same form and manner as

the coupon specifically described in the third count of this complaint; that all of said coupons were, by their terms payable prior to the commencement of this action, and subsequent to January 1st, 1902.

III.

That subsequent to the issuance of said bonds and installment coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid one hundred and seventeen installment coupons, in addition to the coupon hereinbefore specifically set forth in the third count of this complaint, and ever since have been and now are the owners and holders of all said installment coupons. [28]

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said one hundred and seventeen installment coupons the sum of \$2,925.00, with interest thereon at the rate of seven per cent per annum from the date when each of said installment coupons respectively fell due.

WHEREFORE, plaintiffs pray judgment against said defendants in the sum of \$6,401.50, together with interest as aforesaid, and for costs of suit.

OSCAR C. MUELLER,
Attorney for Plaintiffs.

State of California,
County of Los Angeles,—ss.

Oscar C. Mueller, being first duly sworn, deposes and says: I am the attorney for the plaintiffs in the above-entitled cause, and make this verification in their behalf;

That said plaintiffs are without the City of Los Angeles and State of California, to wit, in the Republic of Switzerland; I reside and have my office in the said City of Los Angeles, California, wherefore I make this verification.

I have read the amended complaint herein and know the contents thereof; the same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

OSCAR C. MUELLER.

Subscribed and sworn to before me, this 28th day of December, 1906.

[Seal]

WALTER J. LUNDY,
Notary Public in and for the County of Los Angeles,
State of California. [29]

[Endorsed]: No. 1226. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Escher, Plaintiffs, vs. Perris Irrigation District, Defendant. Amended Complaint. Filed Dec. 28, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Oscar C. Mueller, Attorney at Law, 454-6-8 Wilcox Building, Los Angeles, Cal., Attorney for Plaintiffs. [30]

[**Summons.**]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Southern
Division.*

CONRAD ESCHER and LOUIS RAHN, Copart-
ners, Doing Business as ESCHER & RAHN
(Erroneously Suing Herein as JOHN
ESCHER and WILLIAM RAHN, Copart-
ners Doing Business as ESCHER & RAHN),
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Action brought in the said Circuit Court, and the
Complaint filed in the office of the Clerk of said
Circuit Court in the City of Los Angeles, County
of Los Angeles.

The President of the United States of America,
Greeting, To Perris Irrigation District:

You are hereby required to appear in an action
brought against you by the above-named plaintiff,
in the Circuit Court of the United States, Ninth Cir-
cuit, in and for the Southern District of California,
Southern Division, and to file your plea, answer or
demurrer to the amended complaint filed therein (a
certified copy of which accompanies this summons),
in the office of the Clerk of said court, in the City of
Los Angeles, County of Los Angeles, within twenty
days after the service on you of this summons, or

judgment by default will be taken against you.

The said action is brought to recover the sum of \$6,401.50, of which said plaintiff alleges \$3,451.50 to be due and owing from defendant in payment of certain interest bearing coupons, all payable prior to the commencement of this action and subsequent to December 31st, 1901, which coupons were attached at the time of their issuance to 118 bonds duly issued by the defendant on or about the first day of January, 1891, and which said bonds together with the said coupons subsequent to their issuance and prior to the commencement of this action plaintiffs in good faith and in the ordinary course of business and for value before the apparent [31] maturity of said bonds or of said coupons or any of them, and without the knowledge of any defects therein, acquired and ever since have been and are now the owners and holders thereof; and plaintiff further alleges that said coupons have not, nor has any part of any one of said coupons, been paid; plaintiff also prays judgment for interest at the rate of seven per cent per annum from the date when each of said coupons respectively fell due; plaintiff further alleges that of said sum of \$6,401.50 the sum of \$2,950.00 is due and owing from the defendant in the payment of certain installment coupons attached to each of the aforesaid bonds at the time of their issuance, all of which installment coupons were payable prior to the commencement of this action and subsequent to January 1st, 1902, and that the said installment coupons have not been paid, nor has any part of any one of said coupons been paid, that there is now due, owing and

unpaid on said 118 installment coupons the sum of \$2,950.00 with interest thereon at the rate of seven per cent per annum from the date on which each of the said coupons respectively fell due; that the total amount of the installments due and unpaid upon all of said bonds is the sum of \$2,950.00; plaintiffs also pray judgment for interest in said installments at the rate of seven per cent per annum from the time they respectively fell due and for costs of suit; all of which more fully appears from the complaint on file in this case, to which you are hereby expressly referred.

And if you fail to appear, and plead, answer or demur, as herein required, your default will be entered and the plaintiff will take judgment against you for the sum demanded in the amended complaint, to wit, the sum of \$6.401.50 and interest and costs. [32]

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirty-first.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Charles N. Williams,

Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 2d day of July, 1907, and personally served the same on the — day of —, 18, by delivering to and leaving with W. H. Pilch, July

9th, 1907, A. R. Frederick, July 20, 1907, A. McPherson, July 9th, 1907, Directors of the Perris Irrigation District, a corporation, said defendant named therein, personally, a certified copy thereof, together with a copy of the Complaint, certified to by Wm. M. Van Dyke, attached thereto. A. R. Frederick and W. H. Pilch served in Riverside Co., and D. McPherson served in San Bernardino Co. in said district.

LEO V. YOUNG WORTH,

U. S. Marshal.

By B. H. Franklin,

Deputy.

Los Angeles, July 19, 1907.

[Endorsed]: Marshal's Doc. No. 967. No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher et al. vs. Perris Irrigation District. Summons. Oscar C. Mueller, Plaintiff's Attorney. Filed Jul. 25, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [33]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

CONRAD ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

**Amended Return of Service of Complaint and
Summons.**

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY: That I received the Summons in the above-entitled action on the 3d day of January, 1907, and personally served the same on the Perris Irrigation District, the defendant therein named, by delivering to and leaving with W. H. Pilch, the President of and a member of, the Board of Directors of said Perris Irrigation District, a copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court; by delivering to and leaving with A. R. Frederick, a member of the Board of Directors of said Perris Irrigation District, a certified copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court; and by delivering to and leaving with D. McPherson, a member of the Board of Directors of said Perris Irrigation District, a certified copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court.

I FURTHER CERTIFY: That I delivered said certified copy of the Summons and Complaint to W. H. Pilch, personally on the 9th day of July, 1907, in the County of Riverside, State of California, and left the same with him; that I delivered said certified copy of the Summons and Complaint to A. R. Fred-

erick, personally, on the 20th day of July, 1907, in the County of Riverside, [34] State of California, and left the same with him; that I delivered said certified copy of the Summons and Complaint to D. McPherson, personally, on the 9th day of July, 1907, in the county of San Bernardino, State of California, and left the same with him.

LEO V. YOUNG WORTH,

United States Marshal.

By B. H. Franklin,

Deputy.

[Endorsed]: No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California. Conrad Escher et al, Plaintiff, vs. Perris Irrigation District, Defendant. Amended Return of Service of Complaint and Summons. Filed Sep. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Oscar C. Mueller, Attorney for Plaintiff. [35]

*In the Circuit Court of the United States of the
Ninth Judicial Circuit, in and for the Southern
District of California, Southern Division.*

No. 1226.

CONRAD ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Default.

In this action the defendant, Perris Irrigation Dis-

trict, having been regularly served with process, and having failed to appear and plead to, answer, or demur to the plaintiff's complaint on file herein, and the time allowed by law for answering, pleading or demurring having expired, the default of said Perris Irrigation District in the premises is hereby duly entered, according to law.

Attest my hand and the seal of said Circuit Court this 12th day of September, A. D. 1907.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Charles N. Williams,

Deputy Clerk.

[Endorsed]: No. 1226. U. S. Circuit Court, Southern District of California, Southern Division. Conrad Escher et al. v. Perris Irrigation District. Default. Filed Sep. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [36]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

No. 1226.

ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Judgment.

Come now the plaintiffs in the above-entitled action and apply for the relief demanded in their com-

plaint filed herein; and it appearing to the satisfaction of the court that the Summons and Complaint in this action have been duly and regularly served upon the defendant, Perris Irrigation District; that the legal time for appearing and answering said complaint has expired and that said defendant has failed to appear and answer said complaint or *demurrer* thereto; and that the default of said defendant has heretofore been duly and regularly entered according to law;

IT IS HEREBY ORDERED that judgment be entered against said defendant, Perris Irrigation District, and in favor of plaintiffs in accordance with the prayer of plaintiffs' said complaint on file herein.

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiffs herein do have and recover from the defendant, Perris Irrigation District, the sum of \$6,401.50 principal, [37] and \$4,928.80 interest, in all the sum of \$11,330.30, together with the plaintiffs' costs herein taxed at \$——, and that this judgment bear interest at the rate of seven (7) per cent per annum from the date of its entry.

Judgment entered February 18, 1913.

W. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

No. 1226. United States District Court, Southern District of California, Southern Division. Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, De-

fendant. Copy Judgment. Filed Feb. 18, 1913.
Wm. M. Van Dyke, Clerk. By Chas. N. Williams,
Deputy Clerk. Oscar C. Mueller, 824 I. N. Van
Nuys Building, 210 West 7th Street, Los Angeles
Cal., Solicitor for Plaintiffs. [38]

**[Certificate of Clerk U. S. District Court to
Judgment-Roll.]**

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

C. C. No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court
of the United States for the Southern District of
California, do hereby certify the foregoing to be a
true copy of the judgment entered in the above-
entitled action and recorded in Judgment Book
No. 2 of said Court for the Southern Division, at
page 196 thereof, and I further certify that the fore-
going papers hereto annexed, constitute the Judg-
ment-roll in said action.

Attest my hand and the seal of said District Court
this 18th day of February, A. D. 1913.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 1226. In the District Court of
the United States for the Southern District of Cali-
fornia, Southern Division. Escher & Rahn vs.
Perris Irrigation District. Judgment-roll. Filed
February 18th, 1913. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk. Recorded
Judgment Register Book No. 2, page 196. [39]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California.*

Clerk's Office.

No. 1226.

CONRAD ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Praeceptum to Enter Default.

To the Clerk of said Court:

Sir: The defendant, Perris Irrigation District,
having failed to appear and answer the plaintiffs'
Complaint herein, and the time for answering hav-

ing expired, you will therefore enter the default of said Defendant herein according to law.

Dated September 3, 1907.

OSCAR C. MUELLER,
Attorney for Plaintiffs.

[Endorsed]: No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California. Conrad Escher et al., Plaintiffs, vs. Perris Irrigation District, Defendant. Praecipe for Entering Default. Filed Sept. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [40]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER, and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Notice of Motion to Set Aside Service of Summons.
To Conrad Escher and Louis Rahn, and to Oscar C.
Mueller, Their attorney:

YOU ARE HEREBY NOTIFIED that the Perris Irrigation District, by its attorneys, John D. Works, Bradner Lee, Lewis R. Works and Frank W. Stafford, will appear in said court June 17, 1912, specially for the purpose set out in the motion, and

file said motion to set aside the service of summons in the above-entitled action on the ground that the Perris Irrigation District has never been served with summons in said action, nor has it ever entered appearance, accepted service or waived the service of summons in said action.

Said motion is made upon the records, files and proceedings of said court, in said action, together with the motion to set aside the service of summons and the affidavits thereto attached.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
Attorneys for Defendant. [41]

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis *Escher*, Doing Business as Escher and Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Notice of Motion to Set Aside Service of Summons. Received copy of the within June, 6, 1912. Oscar C. Mueller, William M. Hiatt, Attys. for Plff. Filled Jun. 6, 1912. Wm. M. Van Dyke, Clerk, By Chas. N. Williams, Deputy Clerk. Bradner Lee, Frank W. Stafford, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [42]

*In the District Court of the United States, Ninth
Circuit, Southern District of California, South-
ern Division.*

No. 1226.

ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Motion to Set Aside Service of Summons.

Now comes the defendant and enters appearance, specially, in the above-entitled action, for the purpose of this motion only, and for no other purpose, and moves the Court to set aside the service of summons in said action, on the following grounds, to wit:

I.

That the persons served with summons in said action were not directors of the Perris Irrigation District at the time of service of summons on them in said action and reference is made to the affidavits hereto attached and are made a part of this motion and to the law governing the Perris Irrigation District and irrigation districts in the State of California, at page 262 of Statutes and amendments to the codes of California, of 1897, which statute in part reads as follows: "Sec. 26. A director shall be a resident and freeholder of the irrigation district, but not necessarily of the division for which he is elected." [43]

The Political Code of California provides in Sec. 996; VACANCIES, HOW THEY OCCUR.—An office becomes vacant on the happening of either of the following events before the expiration of the term:

(Subvd.) 3. His resignation.

(Subvd.) 5. His ceasing to be an inhabitant of the State, or, if the office be local, of the district, county, city, or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged.

(Subdv.) 7. His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the State by permission of the legislature:

II.

That the summons was not served as required by section 411 of Code of Civil Procedure, of the State of California, which provides as follows:

“Sec. 411. SUMMONS, HOW SERVED.—

The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this state: to the president or other head of the corporation, secretary, cashier or managing agent thereof.”

III.

That the Complaint in said motion was filed De-

ember 28th, 1905, and the summons was executed by the clerk of said court on the 28th day of December, 1906, that said summons was received by the United States Marshal on July 2d, 1907, and was attempted to be served July 9th, 1907, on certain persons alleged to have been directors of the Perris Irrigation District. That the summons was not issued within one year to any person able and authorized to serve the same, and if such summons was issued to some person able and authorized to serve the same, within said year, then it is not shown that due diligence was used to procure service of said summons within sixty days after the issuance of the said summons. [44]

That the said motion is made upon the records, files and proceedings in said court, in said action, and affidavits hereto attached.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
Attorneys for Defendant. [45]

[Affidavit of Edith C. Frederick in Support of Motion to Set Aside Summons.]

State of California,
County of Riverside,—ss.

EDITH C. FREDERICKS, being duly sworn, on her oath says: That she was the wife of A. R. Frederick of Riverside County, California, from the year 1895 until 1905; that immediately after the marriage of affiant with A. R. Frederick he conveyed to her certain parcels and tracts of real estate in the Perris

Irrigation District, County of Riverside, State of California, and that the said A. R. Frederick never owned or had any legal interest in any real property within the limits of the Perris Irrigation District other than that so conveyed to this affiant until this affiant in the year 1906, after she had been divorced from said A. R. Frederick, conveyed the said real estate heretofore mentioned to the said A. R. Frederick; that on or about December, 1904, or January, 1905, the said A. R. Frederick removed from the Perris Irrigation District, and took up his residence at a point in Riverside County, outside of said Perris Irrigation District, known as Good Hope Mine; that thereafter the said A. R. Frederick removed to the Town of Lake View, which is without the boundaries of the Perris Irrigation District, in the said County of Riverside, and that said A. R. Frederick beginning at the time stated was not a resident of the Perris Irrigation District for more than one year, and to the best of affiant's knowledge and belief he did not again become a resident of Perris Irrigation District for a considerable period of time thereafter, and that the said A. R. Frederick has been absent subsequent to his return to Perris Irrigation District as aforesaid, and has left the said District and remained away from said District for long periods of time; and further affiant sayeth not.

EDITH C. FREDERICK.

Subscribed and sworn to before me this 4th day of June, 1912.

[Seal]

K. D. HARGER,

Notary Public in and for Riverside County, State of California. [46]

Affidavit [of A. R. Frederick in Support of Motion to Set Aside Summons].

State of California,
County of Riverside,—ss.

A. R. Frederick, being duly sworn, on his oath states that on July 7, 1902, and for several years prior thereto, he was not the legal owner of any real estate within the boundaries of the Perris Irrigation District, in the County of Riverside, State of California, nor was he such owner until the year 1906, when by conveyance he received a legal title to certain parcels of real property in the said District; that on July 7, 1902, he was a resident of the Perris Irrigation District in the County of Riverside, State of California, and continued to be such resident until the latter part of 1904 or the first months of 1905, when he removed from Perris Irrigation District and resided without the said Perris Irrigation District for a period of more than one year;

That he was appointed a Director of the Perris Irrigation District on or about July 7, 1902; that no lawful meeting of the Board of Directors appointed at said date, viz.: W. H. Pilch, D. McPherson and this affiant was held, no secretary was appointed nor did this affiant or any of the other Directors after the year 1902 within his knowledge

ever believe that they were authorized nor did they perform any duty required of them by law as Directors of the said Perris Irrigation District, and did at all times refuse to perform any official acts after the year 1902; and this affiant did specifically deny the fact that he was such Director to the Deputy United States Marshal at the time of serving of Summons upon him in the actions now pending, said service being made in July, 1907; that to the best of affiant's knowledge and belief he was at that time residing in Riverside County, but without the boundaries of the Perris Irrigation District. And further affiant sayeth not.

[Seal]

A. R. FREDERICK.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal]

H. M. HARFORD,

Notary Public in and for the County of Riverside,
State of California. [47]

[Affidavit of George H. Sawyer in Support of Motion to set aside Summons.]

State of California,

County of Riverside,—ss.

Geo. H. Sawyer, being first duly sworn on oath, says that he is a resident of the city of Riverside, County of Riverside, State of California; that he formerly was a resident in the Perris Irrigation District in said County; that he is personally acquainted with Duncan McPherson, also known as D. McPherson; that he was acquainted with the said Duncan McPherson during the period when the said

Duncan McPherson was a resident of the Perris Irrigation District in said county; that the said Duncan McPherson left the said Perris Irrigation District on or about December, 1904, and went to reside in Los Angeles County, where he remained for a short period only, and afterwards removed to Victorville, in San Bernardino County, where he is still a resident.

And further affiant says not.

GEO. H. SAWYER.

Subscribed and sworn to before me this 4th day of June, 1912.

[Seal]

K. D. HARGER,
Notary Public. [48]

[Affidavit of H. M. Harford in Support of Motion to Set Aside Summons].

State of California,
County of Riverside.

H. M. Harford, of lawful age, first being duly sworn, deposes and says that he has been a resident of Perris in the Perris Irrigation District of Riverside County, California, since December 5, 1900, that he was well acquainted with D. McPherson, a former resident of Perris, and that said D. McPherson removed from Perris to Victorville, California, sometime prior to October, 1906.

H. M. HARFORD.

Subscribed and sworn to before me this 3d day of June, 1912,

[Seal]

W. W. STEWART,
Notary Public in and for said County of Riverside,
State of California. [49]

[**Affidavit of K. D. Harger in Support of Motion to Set Aside Summons.**]

State of California,
County of Riverside,—ss.

K. D. Harger, being first duly sworn on oath, says that he is Secretary of The Riverside Abstract Co., a corporation with its principal place of business at Riverside, California, that as such Secretary he is competent to make the following affidavit, and does make the following affidavit on behalf of said corporation; that the business of said corporation is that of examining the records of Land Titles in said County; that he has examined the records of Riverside County for the purpose of determining whether or not Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them was ever a freeholder in said county, and for the purpose of determining by said records what land, if any, the said Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them, ever owned in the Perris Irrigation District situated in said county; when they owned said land, if any, and when they disposed of same.

Further affiant says that the examination of said records reveals the following state of facts:

Wm. H. Pilch on Oct. 2, 1894, purchased from Julia A. Chandler and others, Lots 4, 5 and 12 in Chandler's Subdivision of the N. E. quarter of Sec. 13, T. 4 S., R. 4 W., S. B. B. & M. The deed given was recorded on Aug. 3, 1894 in Book 21 of Deeds, at page 107, Riverside County Recorder's Office.

The said Wm. H. Pilch on Oct. 15, 1894, conveyed

all of the above-described land to Mrs. Ruth E. Pilch. [50]

Duncan McPherson purchased on March 29, 1892, from Louis L. Newerf and wife lot 5 in Newerf's Subdivision in Sec. 6, T. 5 S., R. 3 W., S. B. B. & M. Said deed was recorded July 16, 1894, in Book 17 of Deeds, at page 85.

Said Duncan McPherson sold the above-described parcel of land to Thomas J. Robinson July 31, 1899, and said deed was recorded Aug. 3, 1899, in Book 78 of Deeds, at page 189.

Said Duncan McPherson purchased from W. A. Bingham and wife and John H. Lee and wife by Deed dated Sept. 12, 1901, the N. W. quarter of the S. E. quarter and the S. W. quarter of the S. E. quarter and the south half of the S. E. quarter of the S. E. quarter and the N. W. quarter of the S. E. quarter of the S. E. quarter, all in Sec. 32, T. 4 S., R. 3 W., S. B. B. & M.

Said deed was recorded March 8, 1902, in Book 118 of Deeds, at page 166. Said Duncan McPherson sold said land to C. I. Ritchy by deed dated March 7, 1902, and recorded March 8, 1902, in Book 132 of Deeds, at page 247.

A. R. Frederick purchased from the Perris Land Co., by deed dated Nov. 11, 1893, all of Lot 1, in Block 20 of the Riverside Tract, said deed was recorded Nov. 17, 1893, in Book 80 of Deeds at page 113. Said A. R. Frederick sold said parcel of land to M. L. Lawrence by deed dated Nov. 30, 1893, and recorded Feb. 21, 1894, in Book 10 of Deeds, at page 226.

Said A. R. Frederick purchased a second time Lot

1, in Block 20, Riverside Tract from Edith C. Frederick by deed dated April 25, 1906, and recorded April 25, 1906, in Book 225 of Deeds, at page 10.

[51]

Said A. R. Frederick sold said last described parcel July 20, 1907, to V. A. Lawrence, which deed was recorded July 22, 1907, in Book 250 of Deeds, at page 11.

Said A. R. Frederick purchased from Edith C. Frederick by deed dated Oct. 5, 1906, all of lots 23, 24 and 25 in Block 4 of the town of Perris, and lots 4, 5 and 6 in Block 1 of Blethen's Addition to Perris, which deed was recorded Oct. 5, 1906, in Book 225 of Deeds at page 330. Said A. R. Frederick sold said lots 23, 24 and 25 above-described to Alexander T. Crane by Deed dated April 20, 1907, and recorded May 13, 1907, in Book 240 of Deeds at page 86.

Said A. R. Frederick sold Lots 4, 5 and 6 in Block 1, above described, to Aurilla D. Thompson by Deed dated Aug. 6, 1907 and recorded Aug. 9, 1907, in Book 242 of Deeds, at page 303.

Further this Affiant says that the foregoing constitutes all of the land that the said Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them, ever owned in the Perris Irrigation District in said county as shown by said records, subsequent to the formation of Riverside County, June 5th, 1893.

K. D. HARGER.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal]

RAYMOND BEST,
Notary Public.

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiffs, vs. Perris Irrigation Company. Motion to set aside service of Summons. Received copy of the within 6th day of June, 1912. Oscar C. Mueller, William M. Hiatt, Attys. for Plffs. Filed Jun 6. 1912. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. Bradner W. Lee, Frank W. Stafford, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Solicitors for Defendants. [52]

Notice of Motion [for Order Dismissing Action].

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

EQUITABLE INVESTMENT COMPANY, a Corporation,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

To the Plaintiff and to Oscar C. Mueller and W. M. Hiatt, Attorneys for Plaintiff.

Now comes the defendant in the above-entitled action and enters appearance, not generally but specially, and for the purpose of the motion herein mentioned and not otherwise.

You will please take notice that on Monday, the

24th day of June, 1912, at 10:30 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, the defendant will move the said court for an order dismissing the above-entitled action.

The said motion will be made upon the records, files and proceedings in said action and upon the written motion, copy of which is served upon you herewith, and upon the following grounds:

1. That the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [53]

2. That the said records, files and proceedings affirmatively show that such is the fact, that the plaintiff failed "to make a *bona fide* effort to procure service of summons upon the defendant" in said action, "within sixty (60) days after the issuing thereof," as required by said Rule 7.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
WORKS and JORDAN,
Attorneys for Defendants. [54]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

EQUITABLE INVESTMENT COMPANY, a Corporation,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Motion [for Order Dismissing Action].

Now comes the defendant in the above-entitled action and enters appearance, not generally but specially, for the purpose of this motion only and not otherwise, and moves the court for an order dismissing the above-entitled action.

The said motion is made upon the records, files and proceedings herein, pursuant to the notice of motion served upon you herewith, and upon the following grounds:

1. That the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

2. That the said records, files and proceedings affirmatively show that such is the fact, that the plaintiff failed "to make a *bona fide* effort to procure ser-

vice of summons upon the defendant in said action "within sixty (60) days after the issuing thereof," as required by said Rule 7.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
WORKS and JORDAN,

Attorneys for Defendant. [55]

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. *Equitable Investment Company*, a Corporation, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion and Motion. Received copy of the within Notice June 19, 1912. Oscar C. Mueller per F. Strubbe. Filed Jun. 19, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bradner W. Lee, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal. Frank W. Stafford, Works and Jordan, Solicitors for Defendants. [56]

*In the United States District Court, Ninth Circuit,
Southern District of California, Southern Di-
vision.*

No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners, Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Affidavit [of Oscar C. Mueller], Dated July 20, 1912.

State of California,

County of Los Angeles,—ss.

Oscar C. Mueller, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that the complaint in said action was filed December 29th, 1904; that the summons in said action was duly issued by the Clerk of this Court on December 16th, 1905; that the Hon. C. C. Wright was the attorney for the plaintiff in said action and appeared as such attorney at the time of the filing of said complaint herein, and continued as the attorney for the plaintiff in said action until his death, January 18, 1906; that thereafter affiant was substituted as one of the attorneys for the plaintiff in said action and has continued ever since to be and now is, one of the attorneys for said plaintiff in said action; that he inquired of the Hon. John D. Works, one of the attorneys now

appearing for the defendant in said action, as to who were the officers of the said defendant District; that said Hon. John D. Works had theretofore represented said Perris Irrigation District in another action brought in the Circuit Court of the United States for the Southern District of California, by said [57] plaintiff against said defendant, which action had theretofore been tried and judgment entered and had been appealed and the judgment affirmed by the United States Circuit Court of Appeals, Ninth Circuit; that said Hon. John D. Works informed affiant that he did not know who are the officers of the District; that he did not know where the minute-books or records of the District could be obtained, and that he did not know where the information which affiant desired could be obtained; that thereafter, and in the early part of the year 1907, affiant made a trip to the town of Perris, situated within the limits of said defendant District; that he inquired of many persons living there, who the officers of the District were, but could obtain no information concerning the same; that affiant employed the Pinkerton Detective Agency to make an investigation for the purpose of learning who were the officers of said defendant District; that after such investigation, which investigation covered a considerable period of time, said detective agency gave affiant the names and residences of three of the persons, to wit, W. H. Pilch, Duncan MacPherson, and A. R. Frederick, who were reputed to be the directors of said defendant District, and reported that said W. H. Pilch was reputed to be the President of said Dis-

trict; that from the time affiant became one of the attorneys for the plaintiff in said action, until just prior to the time the summons in said action was delivered to the United States Marshal for service affiant was making every effort to learn who were the officers of said defendant District, and who was the President of said District, and the person upon whom such service should be made; that during said time whenever he met any person residing in said District, or who had resided in said [58] District, or whom he thought by any chance might have knowledge of who were the officers of said District, he inquired concerning such officers, but was never able to get any such information until prior to the delivery of said summons to said United States Marshal for service; that during said time he inquired and endeavored to obtain such information from a very large number of people; that the plaintiff in said action resided in the City of Brooklyn, in the State of New York; that said plaintiff informed affiant that he had no knowledge concerning who were the officers of said District.

OSCAR C. MUELLER.

Subscribed and sworn to before me this 20th day of July, 1912.

[Seal]

ANNA M. McGREW,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires January 26, 1915.

[Endorsed]: No. 1226. United States District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plain-

tiffs, vs. Perris Irrigation District, Defendant. Affidavit. Received copy of the within affidavit this 31st day of July, 1912. John D. Works, Lewis R. Works, Bradner W. Lee, Frank W. Stafford, Solicitors for Defendant. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, 404—452—4—6 Wilcox Building, 206 South Spring St., Los Angeles, Cal., Solicitor for Plaintiffs. [59]

*In the United States District Court, Ninth Circuit,
Southern District of California, Southern Division.*

No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners,
Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Affidavit [of William M. Hiatt].

State of California,
County of Los Angeles,—ss.

William M. Hiatt, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that after becoming one of such attorneys and until about the time of the delivery of the summons in said action to the United States Marshal for service, he made inquiry of all persons whom he met and whom he

thought might have knowledge of the affairs of said defendant District, but that no persons of whom he so inquired could give or would give affiant any information concerning who were the officers of said defendant District; and that he was unable to learn who was the President of the Board of Directors of said defendant District until within a short time prior to the service of the summons in said action; that on or about the first day of May, 1907, affiant went to the town of Perris, situated within the limits of said defendant District, for the purpose of endeavoring to learn who were the officers of said defendant District, and for the purpose of endeavoring to locate and obtain inspection of the minute books of said defendant District; that he inquired of Mr. Hook, one of the firm of Hook Bros. engaged in business in said town, but that said Mr. Hook [60] could not or would not give affiant the name of any director or officer of said defendant District; that affiant also inquired of Mr. Hook where the minute-books of said District could be found, and said Mr. Hook informed affiant that he did not know where any of the minute-books of said District were or where they could be found, or who could give any information concerning the whereabouts of said minute-books; that affiant also inquired of a Mr. Gates, a Justice of the Peace residing in said town, but that said Mr. Gates could not or would not give affiant any information concerning who were the officers of the said District or concerning any of the records of the District; that affiant inquired of a number of other persons residing in said District, whose names affiant

does not now remember, but that affiant was unable to obtain from any person any information as to who were the directors of said District, or who was the President of said District, or who was the Secretary of said District, or as to the whereabouts of the minute-books of said District; that affiant requested the Riverside Abstract Company to make a search of the records of the County Recorder's office of the County of Riverside, the same being the county within which said defendant District is situated, and to make a report to affiant giving the name of every person who had ever filed, in said recorder's office a bond as a director of said District; that from the report of said Riverside Abstract Company, received by affiant pursuant to such request, it appeared that A. R. Frederick, W. H. Pilch, and Duncan McPherson were the last persons to file in said recorder's office, bonds as directors of said District.

WILLIAM M. HIATT.

Subscribed and sworn to before me this 30th day of August, 1912.

[Seal]

ANNA M. MCGREW,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires January 26, 1915. [61]

[Endorsed]: No. 1226. In the U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, doing business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Affidavit. Rec'd copy of within aff. this 31st day of Aug. 1912. Works, Lee & Works, Lewis

R. Works, Attys. for Deft. Oscar C. Mueller and William M. Hiatt, Attorneys for Plaintiff. Frank W. Stafford. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[62]

*In the United States District Court, Ninth Circuit,
Southern District of California, Southern Division.*

No. 1226.

ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit of [Oscar C. Mueller, Dated July 12, 1912].

State of California,

County of Los Angeles,—ss.

Oscar C. Mueller, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has inquired of Lewis R. Works, one of the attorneys for the defendant, in reference to the whereabouts of the minute-books of the defendant; that said Lewis R. Works produced and allowed affiant to inspect one book which purported to be a volume of the minutes of said defendant, and informed affiant that other volumes of said minutes were in the custody of Lafayette Gill, an attorney at law, having an office at Riverside, California, that affiant, on the 26th day of June, 1912, went to Riverside, California, and to

the office of said Layfayette Gill, and was there shown two books purporting to be minute-books of said defendant; that none of the books shown to affiant contained the minutes of any meetings of the Board of Directors of the Perris Irrigation District, subsequent to the year 1893; that affiant does not know where the books containing the records of the proceedings of said Board of Directors of said defendant District, subsequent to the year 1893 are to be found, although he has made diligent inquiry for the same; that affiant while at Riverside, on said 26th day of June, 1912, [63] examined the papers and files in the office of the County Clerk of said County, in an action entitled, "J. C. Cullen, Plaintiff, vs. Perris Irrigation District, Defendant," No. 2201 in the Superior Court of said County; that said action was commenced in the Superior Court of the City and County of San Francisco, State of California; that the summons in said action, as shown by the return endorsed thereon, was served on W. H. Pilch, President of the Perris Irrigation District, on the 10th day of April, 1903, by the Sheriff of said County of Riverside; that said Perris Irrigation District appeared in said action by Layfayette Gill, its attorney, and filed a notice of motion and motion to change place of trial, accompanied by the affidavit of W. H. Pilch, as President of said defendant District, and that thereafter an order was duly made by said Superior Court of the City and County of San Francisco, transferring said action to the Superior Court of the County of Riverside, State of California; that a copy of a certified copy of the summons in said action, together with

the return of service endorsed thereon, is attached to this affidavit and marked Exhibit "A"; that a copy of a certified copy of the Notice of Motion, and Motion to Change Place of Trial, and Affidavit of W. H. Pilch, filed in said action, are hereto attached and marked Exhibit "B."

That a copy of a certified copy of the verification of W. H. Pilch President of defendant district in case of Leeman vs. Perris Irrigation District, is attached hereto and marked Exhibit "C."

OSCAR C. MUELLER.

Subscribed and sworn to before me this 12 day of July, 1912.

[Seal]

ANNA M. MCGREW.

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires January 26, 1915. [64]

**Exhibit "A" [to Affidavit of Oscar C. Mueller—
Summons in Cullen vs. Perris Irrigation Dis-
trict].**

*In the Superior Court of the State of California,
in and for the City and County of San Francisco.*
J. C. CULLEN,

Plaintiff,

VS.

**THE PERRIS IRRIGATION DISTRICT, a Cor-
poration,**

Defendant.

Action brought in the Superior Court of the City and County of San Francisco, State of California, and the complaint filed in the office of the Clerk of the said City and County of San Francisco.

JOHN R. AITKIN,
Attorney for Plaintiff.

The People of the State of California Send Greeting to The Perris Irrigation District (a Corporation), Defendant.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the City and County of San Francisco, State of California, within ten days after the service on you of this summons, if served within this county; or within thirty days if served elsewhere.

And you are hereby notified unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the City and County of San Francisco, State of California, this 2d day of July, A. D. 1900.

[Seal]

WM. A. DEANE,
Clerk.

By E. M. Thompson,
Deputy. [65]

Sheriff's Office,
County of Riverside,—ss.

I hereby certify that I received the within Sum-

mons on the 9th day of April, A. D. 1903, and personally served the same on the 10th day of April, 1903, on W. H. Pilch, President of the Perris Irrigation District, being the defendant named in said Summons by delivering to said defendant personally in the County of Riverside, a copy of said Summons attached to a copy of the Complaint in the action therein mentioned.

Dated April 10th, 1903.

P. M. COBURN,
Sheriff.
By Z. T. Brown,
Deputy.

[Endorsed]: No. 2701. Superior Court, City and County of San Francisco, State of California. J. C. Cullen, Plaintiff, vs. The Perris Irrigation District, Defendant. Summons. Received April 9, 1903. P. M. Coburn, Sheriff. By L. A. Coburn, Deputy. Filed April 14, A. D. 1903. Albert B. Mahory, Clerk. By F. J. Dugan, Deputy. John R. Aitkin, Attorney for Plaintiff.

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true, and correct copy of the Summons in case of J. C. Cullen, vs. The Perris Irrigation District, a corporation, on file in my office.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal this 26th day of June, A. D. 1912.

A. B. PILCH,
Clerk.

By Chas. O. Reid,
Deputy Clerk. [66]

**Exhibit "B" [to Affidavit of Oscar C. Mueller—
Notice of Motion to Change Place of Trial in
Cullen vs. Perris Irrigation District].**

No. 2701.

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,
Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,
Defendant.

NOTICE OF MOTION.

and

MOTION TO CHANGE PLACE OF TRIAL.

Filed May 1, 1903.

ALBERT B. MAHORY, Clerk.

By F. J. Dugan, Deputy.

LAYFAYETTE GILL,
Attorney for Defendant. [67]

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Plaintiff Above Named, and His Attorney, John R.
Aitken:

You will please take notice that the defendant will on the 8th of May, 1903, at 10 o'clock A. M. of said day or as soon thereafter as counsel can be heard, in Department 4 of the Superior Court of the City and County of San Francisco, at the courtroom thereof, in the city of San Francisco, move the Court to make an order changing the place of trial of this action from the City and County of San Francisco to the County of Riverside, in the State of California.

Said motion will be made upon the grounds:

I.

That the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action, wholly situated within the County of Riverside, State of California.

II.

That the said defendant, the Perris Irrigation District, on the 1st day of January, 1891, was wholly within the County of San Diego, State of California, but thereafter pursuant to an Act of the Legislature of the State of California, entitled an Act to create

the County of Riverside, classify it, define its boundaries, provide for its organization, and the appointment, election of officers, the location of the county seat by election, and the adjustment and fulfillment of certain rights and obligations arising between said county and certain other counties, [68] approved March 11, 1893, was taken entirely from within the boundaries of San Diego County and became, and ever since has been and now is, a part of the County of Riverside, in said State of California.

III.

That the contracts sued upon in this action were made within the boundaries of the said Perris Irrigation District formerly in the County of San Diego, but now in the County of Riverside, as aforesaid and at no other place.

IV.

That the obligation or liability of the defendant, if any upon said contracts sued upon in this action arose originally in the said County of San Diego, but such if any obligation or liability upon said contracts sued upon herein now exists or existed at the time of the commencement of this action, the same exists in the County of Riverside, in the State of California, by reason of the said defendant, the Perris Irrigation District, having been taken from the said County of San Diego and made a part of the County of Riverside, pursuant to the said Act of the Legislature of the State of California, creating the County of Riverside, approved March 11th, 1893, hereinbefore referred to.

V.

That the principal office and place of business of defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action in the County of Riverside, State of California.

VI.

That any obligation or liability arising or existing upon the contracts sued upon in this action is to be performed at the office of the treasurer of the said Perris Irrigation District, formerly in the County of San Diego, but now in the County of Riverside.

Said motion will be based upon the affidavits of W. H. [69] Pilch, president of the Board of Directors of said defendant, and George M. Pearson, County Surveyor of the said County of Riverside, copies of which affidavits are herewith served upon you; also based upon an Act of the Legislature of the State of California, entitled, "An Act creating the County of Riverside, etc." approved March 11th, 1893; and also based upon the verified complaint of the plaintiff herein, to which Act of the Legislature reference is hereby made. The aforesaid affidavits, the said Act of the Legislature and the complaint of the plaintiff herein will be used upon the hearing of said motion, a copy of said motion is also herewith served upon you.

LAYFAYETTE GILL,
Attorney for Defendant. [70]

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Motion to Change Place of Trial.

Comes now the defendant above named and moves the Court to make an order changing the place of trial of this action from the City and County of San Francisco to the County of Riverside, upon the following grounds:

I.

That the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action wholly situated within the County of Riverside, State of California.

II.

That the said defendant, the Perris Irrigation District, on the first day of January, 1891, was wholly within the County of San Diego, State of California, but thereafter, pursuant to an Act of the Legislature of the State of California, entitled, "An Act to create the County of Riverside, classify it, define its boundaries, provide for its organization, and the appointment, election of officers, the location of county seat by election, and the adjustment and fulfillment of certain rights and obligations arising between said county and certain other counties"; approved March

11th, 1893, was taken entirely from within the boundaries of San Diego County and became, and ever since has been and now is a part of the County of Riverside, in said State of California.

III.

That the contracts sued upon in this action were made [71] within the boundaries of the said Perris Irrigation District, formerly in the County of San Diego, but not in the County of Riverside as aforesaid, and at no other place.

IV.

That the obligation or liability of the defendant, if any, upon said contracts sued upon in this action arose originally in the said County of San Diego, but such, if any, obligation or liability upon said contracts sued upon herein now exists or existed at the time of the commencement of this action, the same exists in the County of Riverside, in the State of California, by reason of the said defendant, the Perris Irrigation District, having been taken from the said County of San Diego and made a part of the County of Riverside, pursuant to the said act of the Legislature of the State of California, creating the County of Riverside, approved March 11th, 1893, hereinbefore referred to.

V.

That the principal office and place of business of defendant, the Perris Irrigation District, now is and was at the time of the commencement of this action in the County of Riverside, State of California.

VI.

That any obligation or liability existing or arising

upon the contracts sued upon in this action is to be performed at the office of the Treasurer of said Perris Irrigation District formerly in the County of San Diego, but now in the County of Riverside.

This motion is based upon the affidavit of W. H. Pilch, President of the Board of Directors of the said defendant, the Perris Irrigation District, and upon the affidavit of George M. Pearson, County Surveyor of the said County of Riverside, which said affidavits are each attached hereto and made a part hereof, and will also be based upon an act of the Legislature entitled, "An Act creating the County of Riverside, etc.," approved March 11th, 1893, to which reference is hereby made.

LAYFAYETTE GILL,
Attorney for Defendant. [72]

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,
Defendant.

Affidavit of W. H. Pilch [on Motion to Change Place of Trial in Cullen vs. Perris Irrigation District].

State of California,

County of Riverside—ss.

W. H. Pilch, being first duly sworn, deposes and says: That he is the President of the Board of Directors of the defendant herein, the Perris Irrigation

District; that the said Perris Irrigation District now is and was at the time of the commencement of this action wholly situated within the County of Riverside, State of California; that although said defendant, the Perris Irrigation District, was at the time of the issuance of the bonds and coupons sued upon in this action wholly located within the County of San Diego, said district has by an act of the Legislature of the State of California entitled "An Act to create the County of Riverside, etc., approved March 11th, 1893, been taken from the said County of San Diego and included within the said County of Riverside. That the contracts sued upon in this action were made within the said Perris Irrigation District formerly within the County of San Diego but now in the County of Riverside; that the obligation or liability arising upon said contracts or either of them, if any, existed at the time of the commencement of this action were and are to be performed within the said County of Riverside. That the principal and only place of business of the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action in the County of Riverside, in the State of California. [73]

Affiant further saith: That he has fully and fairly stated the facts of the case to Layfayette Gill, Esq., an attorney at law, and attorney for defendant herein, the Perris Irrigation District, and after so fully and fairly stating all the facts of the case to said attorney, he is advised by the said attorney that the defendant herein, the Perris Irrigation District, has a good and valid defense to plaintiff's cause of

action upon the merits thereof, and affiant verily believes from the advice given him by said attorney that the said defendant the Perris Irrigation District, has a good and meritorious defense to plaintiff's cause of action upon the merits thereof.

W. H. PILCH.

Subscribed and sworn to before me this 27th day of April, 1903.

[Notarial Seal] LAYFAYETTE GILL,
Notary Public in and for Riverside County, State of
California. [74]

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

**Affidavit of George M. Pearson [on Motion to
Change Place of Trial in Cullen vs. Perris Ir-
rigation District].**

State of California,
County of Riverside,—ss.

George M. Pearson, being first duly sworn, deposes and says: My name is George M. Pearson; I now am and ever since the creation of the County of Riverside, in the State of California, have been the County Surveyor of the said County of Riverside; that during all of said time I have been and now am a regularly licensed surveyor.

That I am well acquainted with the boundary lines

of the said County of Riverside, and well acquainted with the boundaries of the said defendant, the Perris Irrigation District; that the said defendant, the Perris Irrigation District, now is and continuously has been ever since the creation of the County of Riverside, to wit, the 11th day of March, 1893, wholly within the boundaries of the County of Riverside.

GEO. M. PEARSON.

Subscribed and sworn to before me this 27th day of April, 1903.

[Notarial Seal] LAYFAYETTE GILL,
Notary Public in and for Riverside County, State of
California. [75]

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true and correct copy of the Notice of Motion and Motion to Change Place of Trial in case of J. C. Cullen vs. The Perris Irrigation District on file in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal this 27th day of June, A. D. 1912.

[Great Seal of State.]

A. B. PILCH,
Clerk.

By Chas. O. Reid,
Deputy Clerk. [76]

**Exhibit "C" [to Affidavit of Oscar C. Mueller—
Affidavit to Answer in Leeman vs. Perris Ir-
rigation District, etc.].**

State of California,
County of Riverside,—ss.

W. H. Pilch, being duly sworn, deposes and says that he is President of the Board of Directors of the defendant in the above-entitled action; that he has heard read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters that he believes it to be true.

W. H. PILCH.

Subscribed and sworn to before me this 9th day of August, 1902.

[Seal]

LAFAYETTE GILL,

Notary Public in and for Riverside County, State of California.

[Endorsement on Answer]: In the Superior Court of the County of Riverside, State of California. L. E. Leeman, Plaintiff, vs. Perris Irrigation District, Defendant. Filed Aug. 9, 1902. W. W. Phelps, Clerk. By H. M. Helmer, Deputy. Service of the within Answer is hereby admitted this 9th day of August, 1902. Wilfred M. Peck, Attorney for Plaintiff. Lafayette Gill, Atty. for Deft.

**Affidavit [of W. H. Pilch to Answer in Leeman vs.
Perris Irrigation District].**

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk, and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true and correct copy of the affidavit of W. H. Pilch to the Answer in the case of L. E. Leeman vs. Perris Irrigation District on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 28th day of June, A. D. 1912.

[Seal]

A. B. PILCH,
Clerk.

By Chas. O. Reid,
Deputy Clerk. [77]

[Endorsed]: No. 1226. In the United States District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Affidavit. Rec'd Copy of the Within Affidavit this 12th of July, 1912. Lewis R. Works, L. R. C., Atty. for Defendant. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, William M. Hiatt, Attorneys for Plaintiffs. [78]

[Order Denying Motion to Quash Service of Summons and Motion to Dismiss Cause, etc.]

At a stated term, to wit, The January Term, A. D. 1913, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the seventeenth day of February, in the year of our Lord one *thousand and* thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1226.

CONRAD ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Oscar C. Mueller, Esq., and Wm. M. Hiatt, Esq., appearing as counsel for plaintiffs; Frank W. Stafford, Esq., appearing on behalf of Lewis R. Works, Esq., as counsel for defendant; this cause having heretofore been submitted to the Court for its consideration and decision on defendant's motion to quash the service of summons herein, and also on defendant's motion to dismiss this cause; the Court, having duly considered the same, and being fully advised in the premises; now reads its conclusions in this and cases C. C. No. 1143 and C. C. No. 1256, and it is ordered that defendant's motion to quash the service of summons herein, and defendant's motion

to dismiss this cause be, and said motions hereby are denied; and Frank W. Stafford, Esq., on behalf of defendant's counsel, having moved the Court for a stay of proceedings herein; it is ordered that said cause be, and the same hereby is continued until Tuesday, the 18th day of February, 1913, at 10:30 o'clock A. M., for hearing on said motion. [79]

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Also Other Plaintiffs Against the Same Defendant,
Being Cases C. C. Numbers 1226 and 1256.

**Conclusions of the Court on Defendant's Motions to
Quash and Dismiss.**

The issue raised at this hearing depends upon the law of California. (Revised Statutes of the United States, section 914.)

The Supreme Court of said State, construing sections 405 and 406 of the Code of Civil Procedure, has held, that a summons is issued when the officer charged with its issuance has done all that the law requires him to do in reference thereto. (Cowell vs. Stewart et al., 69 Cal. 525.)

The doctrine of this case, so far from being contrary to, is impliedly sanctioned in *Reynolds vs. Page*, 35 Cal. 296, 300, where the Court says:

“The issuing of the summons intended, is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting [80] a valid service. * * * And we think the summons not issued within the meaning of the Act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal.”

The other California cases cited in defendant's brief do not relate to the point now under consideration; nor does Rule 7 of this court in any way conflict with the decision in *Cowell vs. Stewart*, *supra*, and said decision, I hold, is the law applicable to the case at bar.

This conclusion renders it unnecessary for me to review the other authorities cited in the briefs of the respective parties.

Defendant's motions are denied.

OLIN WELLBORN,

Judge.

[Endorsed]: C. C. No. 1143. United States District Court, Southern District of California, Southern Division. R. H. Thompson vs. Perris Irrigation District. Also C. C. Nos. 1226 and 1256. Conclusions of the Court on Defendant's Motions to Quash and Dismiss. Filed February 17, 1913. Wm. M.

Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.
[81]

*In the District Court of the United States, Ninth
Circuit, Southern District of California, South-
ern Division.*

No. 1226.

ESCHER & RAHN,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Notice of Motion [for Order Setting Aside Judgment].

To the Plaintiff and to Messrs. Oscar C. Mueller and
Wm. M. Hiatt, Attorneys for Plaintiff.

YOU WILL PLEASE TAKE NOTICE that on
Monday, March 31, 1913, at 10:30 o'clock A. M., or
as soon thereafter as counsel may be heard, the de-
fendant in the above-entitled action will move the
Court, in the courtroom thereof, at Los Angeles, Cali-
fornia, for an order setting aside the judgment in
said action, which said judgment was entered therein
on February 18, 1913, on the ground that the sum-
mons in said action was not issued within one year
after the filing of the complaint therein, as required
by sections 406 and 581a of the Code of Civil Pro-
cedure of the State of California and Rule 7 of the
rules of the United States Circuit Court for the
Ninth Circuit, Southern District of California.

The said motion will be made upon the judgment-roll in said action.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
C. HUGHES JORDAN,
Attorneys for Defendant. [82]

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion. Received Copy of the Within March 26, 1913. Oscar C. Mueller, Wm. M. Hiatt, A. M. McGrew. Filed Mar. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bradner W. Lee, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821, H. W. Hellman Bldg., Los Angeles, Cal. Frank W. Stafford, C. Hughes Jordan, Solicitors for Defendant. [83]

[Order Denying Motion to Dismiss Judgment.]

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the thirty-first day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1226.

JOHN ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Wm. M. Hiatt, Esq., appearing as counsel for plaintiff, Lewis R. Works, Esq., appearing as counsel for defendant; now comes said Lewis R. Works, Esq., of counsel for defendant, and moves the Court to dismiss the judgment heretofore entered in this cause; and said motion having been presented and submitted to the Court for its consideration, and decision; it is now by the Court ordered that said motion to dismiss the judgment herein be, and the same hereby is denied. [84]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Assignment of Errors.

Now comes the defendant, Perris Irrigation District, plaintiff in error in the above-entitled cause,

and in connection with its petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred in the proceedings thereof, and upon which it relies to set aside and vacate the judgment of the court and reverse the order and judgment of the Court in overruling the motion of plaintiff in error to set aside and vacate the said judgment entered herein, as appears of record.

I.

That the Court erred in entering judgment in said action, because that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [85]

II.

That the Court erred in entering judgment in said action, because that the complaint therein was filed on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

III.

That the Court erred in entering judgment in said action, because that the said action was commenced on the 28th day of December, 1905, and that the sum-

mons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

IV.

That the Court erred in entering judgment in said action, because that the said action was commenced by the filing of a complaint on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

V.

That the Court erred in entering judgment in said action, because that the same was commenced by the filing of a complaint [86] on the 28th day of December, 1905, and the summons therein was not delivered to the United States Marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

VI.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judg-

ment entered in said action, because that the said motion should have been granted, for the reason that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

VII.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the complaint therein was filed on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [87]

VIII.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the

Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

IX.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced by the filing of a complaint on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

X.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the same was commenced by the filing of a complaint on the 28th day of December, 1905, and the summons therein was not delivered to the United States Marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure [88] of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

Wherefore, plaintiff in error prays that the judg-

ment of the Court and the order overruling the motion to vacate and set aside the judgment of said Court be reversed, and that the mandate of the Court may issue directing that said motion be sustained, and that the judgment entered in said action be vacated and for naught held and taken.

LEWIS R. WORKS,

C. HUGHES JORDAN,

FRANK W. STAFFORD,

Attorneys for Plaintiff in Error.

[Endorsed]: No. 1226. Law. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Assignment of Errors. Filed Aug. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [89]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Petition for Writ of Error.

To the Honorable OLIN WELLBORN, Judge of
the District Court Aforesaid:

Now comes the PERRIS IRRIGATION DIS-
TRICT, a corporation, by its attorneys, and respec-
tively shows that on the 18th day of February, 1913,
the Court granted a default and a final judgment
against the defendant in the above-entitled action;
that the said defendant thereafter entered its special
appearance for the purposes of its motion only, and
filed its said motion in said court, praying the Court
to vacate and set aside the judgment in said action
on the ground that the summons was not issued
within one year after the filing of the complaint in
said action, which said motion was denied by the said
Court on March 31st, 1913.

Your petitioner feeling itself aggrieved by the said
order, and judgment entered therein, as aforesaid,
hereby petitions the Court for an order allowing him
to prosecute a writ of error to the Circuit Court of

Appeals of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the [90] United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said circuit, for the correction of the errors complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiffs in error, conditioned as the law directs.

LEWIS R. WORKS,
C. HUGHES JORDAN,
FRANK W. STAFFORD,

Attorneys for Petitioner in Error.

[Endorsed]: No. 1226. At Law. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Petition for Writ of Error. Filed Aug. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [91]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Order Granting Writ of Error.

BE IT REMEMBERED, That in the above-entitled action, the said PERRIS IRRIGATION DISTRICT, defendant, presented and caused to be filed, its petition praying that a writ of error do issue, and that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, be allowed, and at the same time presented and caused to be filed its assignments of error, all as required by the statutes and rules of said court.

The Court does this 16th day of August, 1913, grant said writ of error upon the giving of a bond in the sum of Three Hundred Dollars (\$300.00), conditioned to answer all costs in said action, and on said appeal, if the plaintiffs in error fail to make good their plea.

OLIN WELLBORN,
Judge of the United States District Court, Southern
District of California.

[Endorsed]: No. 1226. Law. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Order Granting Writ of Error. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [92]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Citation [On Writ of Error (Copy)].

WHEREAS, the defendant in the above-entitled action is about to appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment entered against said defendant in said action, in said District Court of the United States, in favor of the plaintiffs in said action, on the eighteenth day of February, 1913, for Eleven thousand, three hundred

thirty and 30/100 Dollars, and ——— Dollars, cost of suit.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned PACIFIC COAST CASUALTY COMPANY, a corporation organized and existing under the laws of the State of California, and duly authorized to transact a general surety business, does hereby undertake and promise on the part of the appellant that said appellant will pay all costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding THREE HUNDRED DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said surety has caused its corporate name and seal to be affixed by its duly authorized officer at Los Angeles, California, the fifth day of June, 1913.

PACIFIC COAST CASUALTY COM-
PANY

(Seal)

By HARRY D. VANDEVEER,

Its Attorney in Fact. [93]

State of California,

County of Los Angeles,—ss.

On this 5th day of June, in the year one thousand nine hundred and thirteen, before me, Leona Blum, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Harry D. Vandever, known to me to be the duly authorized attorney in fact of the Pacific Coast Casualty Company, and the same person whose name is subscribed to the within instru-

ment as the attorney in fact of said company, and the said Harry D. Vandever, duly acknowledged to me that he subscribed the name of the Pacific Coast Casualty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

LEONA BLUM,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. 1226. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiff, vs. Perris Irrigation District, Defendant. Undertaking on Appeal. Costs only. Approved August 16th, 1913. Olin Wellborn, Judge. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [94]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

No. 1226.

Clerk's Office.

CONRAD ESCHER and LOUIS RAHN, etc.,

vs.

PERRIS IRRIGATION DISTRICT.

Amended Praeipe [for Transcript of Record].

To the Clerk of said Court:

Sir: Please issue transcript on appeal now pending, containing:

The judgment-roll;

Default and all orders, praecipes, etc., relating thereto;

Motion to vacate and set aside service of summons, together with orders, notices, praecipes, etc., pertaining thereto;

Order denying above motion;

Motion to vacate judgment and set aside default, together with orders, notices, praecipes, etc., pertaining thereto;

Order denying above motion;

Petition for Writ of Error;

Assignment of Errors;

Order granting Writ of Error;

Writ of Error;

Citation.

FRANK W. STAFFORD,

C. HUGHES JORDAN,

Attorneys for Defendant.

[Endorsed]: C. C. No. 1226. U. S. District Court, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, etc., vs. Perris Irrigation District. Amended Praeipe for Transcript. Filed Oct. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [95]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

C. C. No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

I, William M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify that the foregoing ninety-five (95) typewritten pages, numbered from 1 to 95, inclusive, and comprised in one volume, are a full, true and correct copy of the pleadings, and of all papers and proceedings upon which the judgment in favor of the plaintiff was made and entered in said cause, and also of the Conclusions of the Court, Assignment of Errors, Petition for Writ of Error, Order Granting Writ of Error, Bond on Writ of Error, and Amended Praecipe for Transcript in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error;

I do further certify that the cost of the foregoing record is \$46.80, the amount whereof has been paid

to me by the Perris Irrigation District, a corporation, the [96] plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America in and for the Southern District of California, Southern Division, this 9th day of December, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[97]

[Endorsed]: No. 2357. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, a Corporation, Plaintiff in Error, vs. Conrad Escher and Louis Rahn, Copartners Doing Business as Escher & Rahn, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed December 26, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Enlarging Time to November 1, 1913, to File
Record Thereof and to Docket Cause.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

PERRIS IRRIGATION DISTRICT,

Plaintiff in Error,

vs.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 1st day of November, 1913.

Dated at Los Angeles, September 5th, 1913.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. 3. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, Plaintiff in Error, vs. Conrad Escher et al., etc., Defendants in Error. Order Extending Time to File Record. Filed Sept. 6, 1913. F. D. Monckton, Clerk.

**[Order Enlarging Time to January 1, 1914, to File
Record Thereof and to Docket Cause.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

PERRIS IRRIGATION DISTRICT,

Plaintiff in Error,

vs.

CONRAD ESCHER and LOUIS RAHN, Copart-
ners Doing Business as ESCHER & RAHN,
Defendants in Error.

Good cause appearing therefor, it is hereby or-
dered that the time heretofore allowed said plain-
tiff in error to docket said cause and file the record
thereof with the clerk of the United States Circuit
Court of Appeals for the Ninth Circuit, be and the
same is hereby enlarged and extended to and includ-
ing the 1st day of January, 1914.

Dated at Los Angeles, October 18th, 1913.

OLIN WELLBORN,
United States District Judge, for the Southern Dis-
trict of California.

[Endorsed]: No..... United States Circuit
Court of Appeals for the Ninth Circuit. Perris Irr-
igation District, Plaintiff in Error, vs. Conrad Escher
and Louis Rahn, Copartners Doing Business as Es-
cher & Rahn, Defendants in Error. Order Enlarging
Time to Docket Cause and File Record. Filed Oct.
20, 1913. F. D. Monckton, Clerk.

No. 2357. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to January 1, 1914, to File Record Thereof and to Docket Case. Refiled Dec. 26, 1913. F. D. Monckton, Clerk.

No. 2357.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Perris Irrigation District,
Plaintiff in Error,

vs.

Conrad Escher and Louis Rahn,
co-partners doing business as
Escher & Rahn,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was commenced on December 28th, 1905, by the filing of the complaint in the office of the clerk of the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. On December 28th, 1906, an amended complaint was filed, verified by Oscar C. Mueller as attorney for the plaintiffs, and on the same day a summons was signed and sealed by the clerk of the court. In this case an affidavit by Oscar C. Mueller is in the record [Transcript, p. 57], in which it is stated that this action was commenced December, 1904, and sum-

mons was issued December 16th, 1905. This would impeach the records of the court, and is apparently a mistake, and the affidavit is merely one that was used in another case.

It is evident that the summons was not delivered to the marshal for service until January 3d, 1907 [Amended Return, Transcript, p. 35]. The original return shows the delivery to have been July 2d, 1907.

W. H. Pilch, Duncan McPherson and A. R. Fredericks were appointed directors July 7th, 1902 [Transcript, p. 47].

The first reference was made to the records of Riverside county, to determine who were the directors of the district by inspection of their bonds on file in the recorder's office in 1907 (more than a year after the commencement of the action).

The questions of law in this case (see specifications of error below) were raised by special appearance in the form of a motion to dismiss [Transcript, pp. 55, 56], and again by a motion to vacate judgment [Transcript, pp. 83, 84], there having been no general appearance on the part of the defendant district.

SPECIFICATION OF ERROR.

The assignment of errors [Transcript, p. 84 *et seq.*] sets out ten alleged errors which will be grouped for convenience with the original numbers in transcript in small type to the left of the first line.

I. That the court erred in entering judgment in said action, because that the summons therein was not issued within, but was issued after the expiration of,

one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

5. That the court erred in entering judgment in said action, because that the same was commenced by the filing of a complaint on the 28th day of December, 1905, and the summons therein was not delivered to the United States marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

8. That the court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that said motion should have been granted for the reason that the said action was commenced on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

9. That the court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said

action was commenced by the filing of a complaint on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

ARGUMENT.

Summons was never legally issued for the reason that it was not issued within one year from the filing of the complaint.

Civil actions are commenced by the filing of a complaint.

C. C. P., Sec. 405;
Rule 6, Ninth Circuit.

The summons may be issued at any time "within one year" after the filing of the complaint.

C. C. P., Sec. 406;
Rule 7, Ninth Circuit.

Summons must be served by the marshal or his deputy.

Rule 8, Ninth Circuit.

From the record it appears that in this case the summons was not delivered to a person, or officer having power to serve it (that is to say, to the marshal or his deputy), within one year from the commencement of the action, by the filing of the complaint.

A SUMMONS IS NOT "ISSUED" UNTIL IT IS DELIVERED
TO SOME PERSON OR OFFICER HAVING POWER TO
SERVE IT.

This rule is supported by abundant authority.

The case of *Hekla Insurance Company v. Schroeder* (9 Ill. App. 472, 475) is a case wherein it was necessary to determine what constitutes "issuance" of summons. There the court, after discussing numerous authorities, announces the rule "that the mere making out, signing and sealing of the summons by the clerk, or even its delivery by him to the plaintiff, or his attorney, is not the commencement of the suit, but that, before the writ can, in a legal sense, be regarded as issued, or the suit commenced, the writ must be either actually or constructively delivered to the sheriff for service."

That decision (*Hekla etc. v. Schroeder*) was apparently based in part on the proposition that, inasmuch as the sheriff is the only person empowered to serve summons, the summons is not issued until delivered to him, who can serve it.

In the case of *White v. Johnson*, 27 Oregon 282, 40 Pac. 511, the question of what constitutes issuance of a summons was raised. The court there said:

"A summons may be said to have issued in an action commenced in the circuit or county courts of this state when it is made out and signed by the plaintiff or his attorney, and placed in the hands of the sheriff, with the intention that it be served upon the defendant. It is difficult to see how anything less than this would constitute an issuance of a summons. The statute requires that

the summons shall be served by the sheriff, and, without a delivery to him for service, such instrument is not yet endowed with vitality for any purpose. *Insurance Co. v. Schroeder*, 9 Ill. App. 472; *Ross v. Luther*, 4 Cow. 158; and *Mills v. Corbett*, *supra*."

In *Mills v. Corbett*, 8 How. (N. Y.) 500, 502, the court said:

"I think any process may be said to be issued, where it is made out and placed in the hands of a person authorized to serve it, and with a *bona fide* intent to have it served, if practicable."

Pease v. Ritchie, 24 N. E. 433, 434, is also authority (by analogy) supporting the contention of plaintiff in error. In that case (speaking of the writ of execution) the court said:

"The question to be considered is whether, within the meaning of the statute, an execution issued on the judgment in favor of Wells, Norton & Walker within one year from the time it was rendered. As before observed, the clerk made out an execution within the year, but it was never delivered to the sheriff to execute, and when found an indorsement was found on the back of the execution, 'Not called for.' We do not think what was done here can be regarded as a compliance with the statute. The statute requires something more than the mere writing of an execution by the clerk, and placing it among the files in his office. The word 'issued,' as used in the statute, has a more comprehensive meaning, and we think that the fair construction of the word as used in the statute requires an execution to be made out, properly attested by the clerk, and delivered to the sheriff to be executed by him. The object of issuing an execution is to collect the judgment; but that object cannot be carried out unless the execution is placed in the hands of an officer for

collection. The only conclusion we are able to reach, when the purpose of the statute is kept in view, is that an execution cannot be said to be issued within the meaning of the statute until it is delivered to the sheriff to execute."

The object of issuing a summons, is that it shall be served, and it is difficult to conceive how that object can be carried out if the writ remains in the hands of a person not qualified or empowered to serve it. As the learned court in the case just cited was unable to reach any conclusion but that a writ of execution must be delivered to the sheriff "to execute" in order that it might be said to have been issued, so we are unable to reach any conclusion but that a summons must be delivered to the marshal to be served before it can be said to have been issued.

The case of *Reynolds v. Page* is a California case dealing with a question somewhat similar to the one here involved. In that case a complaint had been filed and a summons duly signed and sealed delivered by the clerk to plaintiffs' attorney; but the summons was not placed in the hands of an officer or other person for service, and no certified copy of the complaint was prepared and delivered to the plaintiff, or his attorney, for nearly four years. The court in sustaining an order dismissing the action said: "The summons cannot be said to be issued within the meaning of the act, till it is in a condition to serve," and held, that inasmuch as the summons was not delivered in a condition to be served, it was not issued within the meaning of the law.

“And we think the summons not issued within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal.”

Reynolds v. Page, 35 Cal. 296, 299, 300.

It seems clear that if a failure in one particular to place the summons in a condition to be served will render it void, and furnish ground for dismissal of the action, then failure in another particular to place it in condition to be served will also render it void (i. e., not issued). There can be no other reasonable conclusion.

What distinction can there be between its not being in a condition to be served, and its not being in the hands of a person empowered to serve it? In neither case can it be served.

See also:

Ross v. Luther, 4 Cowen (N. Y.) 158.

It will be observed by the court that in each of the cases above cited (except Pease v. Ritchie), the question directly involved is, What constitutes issuance of summons? In each of the cases this point was decided as necessary to the decision of other points; but nevertheless it was directly involved, and we are unable to find any point in any of these cases which would distinguish it from the case at bar.

The rule here contended for is also based on sound legal reasoning in this, that it recognizes the proposition that an action may be commenced, and the statute of limitations forestalled, while there is no *bona fide*

intent, or attempt, to obtain service or in any other manner proceed with the litigation. Moreover, it is the policy of the courts that all matters before them should be expedited in order that their records may not be encumbered with dormant and stale matters.

There is another element of "issuance" to which we desire to call the attention of the court:

Summons must be delivered to some person empowered to serve it, *with a bona fide intent that it be served, if practicable.*

Mills v. Corbett, 6 How. (N. Y.) 500, 502;

Ross v. Luther, 4 Cowen (N. Y.) 158.

That in the case at bar there was no *bona fide* intent to serve summons is disclosed by the fact that, although there were on file (as required by sections 12 and 19 of an act "To provide for the organization and government of irrigation districts," etc. [Henning's General Laws of California, 1905, pp. 559, 562 and 565]) the bonds of the various officers of the Perris Irrigation District (containing the names of those officers), no effort was made to ascertain who they were until shortly before the summons was actually delivered to the marshal.

[See affidavit of Oscar Mueller, Transcript pp. 57, 58, 59, 63, 64 and 65.]

[Affidavit of Wm. M. Hiatt, Transcript pp. 60, 61 and 62.]

Section 12 of the above cited act is as follows:

"The officers elected at the election hereinbefore provided for shall immediately enter upon their duties as such, upon qualifying in the manner for

such officers herein provided. Said officers shall hold office respectively until their successors are elected and qualified."

Section 19, in part, is as follows:

"Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the superior court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of said board."

A defendant may have an action dismissed for want of prosecution, or it is the duty of the court to dismiss, of its own motion, where the record shows that summons has not been issued "within one year after the filing" of the complaint.

C. C. P., Sec. 581a;

Rule 7, Ninth Circuit;

Reynolds v. Page, 35 Cal. 296, 300;

People v. Davis, 143 Cal. 673, 675;

Wiencke v. Bibby, 15 Cal. App. 50, 53;

People v. Mulcahy, 159 Cal. 34, 35.

The case of Cowell v. Stewart (69 Cal. 525), on the authority of which the learned judge of the District Court decided this case, is readily distinguishable from the case at bar. In the Cowell case the proposition that the sheriff was the only person empowered to serve summons was not considered, and did not affect the decision. The question raised was that summons was not served within one year from the filing of the complaint. In fact the summons was during all of the

time in the hands of a person empowered to serve summons; it was in the hands of the attorney for the plaintiff, a person over the age of twenty-one years. Also, the delay was caused by the request of the defendant that the action be delayed, thus raising the point that the defendant should not profit by his own wrong.

In the United States Court (as has been heretofore set forth) the summons can only be served by the marshal or by one of his deputies.

Hence it follows that inasmuch as the law requires that a summons to be issued must be delivered to an officer authorized and empowered to serve it, with the *bona fide* intent that it be served; inasmuch as summons in this case was not issued, as required by law, within one year from the filing of the complaint; and inasmuch as the law provides that an action must be dismissed where summons has not been issued, as required by law, within one year after the filing of the complaint, that the District Court erred in the particulars above set forth in the specifications of error.

Respectfully submitted,

C. HUGHES JORDAN,

FRANK W. STAFFORD,

KENYON F. LEE,

Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
 FOR THE NINTH CIRCUIT.

Perris Irrigation District, <i>Plaintiff in Error,</i> <i>vs.</i> Conrad Escher and Louis Rahn, co-partners doing business as Escher & Rahn, <i>Defendants in Error.</i>	}	
--	---	--

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

We controvert the statement of the case as presented by the plaintiff in error, as follows:

The complaint was filed December 28, 1905.

We contend that the summons was issued December 28, 1906.

The proceedings thereafter consisted of the following:

Summons received by the marshal July 2, 1907;

Summons served July 9, 1907;

Default of defendant for not answering entered September 12, 1907;

Judgment did not immediately fall on account of a bill in equity filed by property owners in the district seeking to restrain the prosecution of the action. See *Quinton v. Equitable Investment Company*, case #2093 of the files of this court—196 Fed. 314.

Notice of motion to set aside service of summons filed June 6, 1912;

Notice of motion to dismiss action filed June 19, 1912;

Judgment for \$11,330.30 entered February 18, 1913.

IT WILL BE SEEN FROM THE FOREGOING THAT NEARLY FIVE YEARS ELAPSED AFTER THE ENTRY OF THE DEFAULT OF THE DISTRICT FOR NOT ANSWERING, AND THEN IT APPEARED SPECIALLY TO SET ASIDE THE SERVICE OF THE SUMMONS UPON THE GROUND THAT THE SUMMONS WAS NOT DELIVERED TO THE MARSHAL WITHIN ONE YEAR FROM THE DATE OF THE FILING OF THE COMPLAINT, ALTHOUGH ADMITTING THE SIGNING, SEALING AND ATTESTING THE SUMMONS WITHIN ONE YEAR FROM THE DATE OF THE FILING OF THE COMPLAINT.

As far as the efforts of Oscar C. Mueller and William M. Hiatt are concerned in locating the officers of the district, we call the court's attention to their affidavits found in folios 57-61, showing in detail their endeavors to find the officers upon whom service could be made. The officers of the district had apparently abandoned their positions and it required the services of private detectives to ascertain the whereabouts of the last known directors. When these were found service was made by the marshal. Commenting upon

the time elapsing from what we claim to be the issuing of the summons and the actual service, counsel say:

“It is not shown where the summons was during this period.”

We contend that it makes no difference where the summons is after the clerk has performed all of his duties and it is in a *condition to be served*. We will show that it was issued within the year after the filing of the complaint and served within the three years allowed by the statutes. The burden is on the plaintiff in error to show that the summons did not leave the clerk's office until more than one year after filing the complaint. This it utterly fails to do.

ARGUMENT.

PLAINTIFF IN ERROR'S APPEAL RESTS SOLELY UPON THE CLAIM THAT THE JUDGMENT IS VOID ON ITS FACE. OTHERWISE IT MUST BE ADMITTED THAT PLAINTIFF IN ERROR WAS GUILTY OF LACHES IN PERMITTING FOUR YEARS AND NINE MONTHS TO INTERVENE BETWEEN THE DATE OF THE ENTRY OF THE DEFAULT OF THE DISTRICT AND THE DATE OF THE MOTION TO SET ASIDE THE DEFAULT.

The contention of the plaintiff in error is founded upon a theory that the judgment is void upon the face of the record. In other words, that the judgment roll shows upon its face such a lack of jurisdiction of the person of the defendant that the judgment is an absolute nullity. Plaintiff in error has no standing in court to be heard upon any question upon the merits of the

case or go into the procedure in the case on account of the fact that so many years intervened between the entry of the default of the plaintiff in error and the making of the motion to set aside the default. In support of this contention it will suffice to call the court's attention to *People v. Davis*, 143 Cal. 676, where the court said:

"It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face unless the motion is made within a reasonable time, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which *in no case exceeds one year*. It is also well settled law that a judgment is not void upon its face unless its invalidity is apparent from an inspection of the judgment roll. It is hardly necessary to cite authorities to sustain these propositions."

We also refer the court to the case of *People v. Mulchy*, 159 Cal. 35, where the court approves the foregoing rule, and says:

"There can be no doubt of the correctness of the rule announced in the above cited case, and it therefore becomes our duty to scan the judgment roll and see whether or not invalidity of the judgment is apparent from an inspection thereof."

Again the Perris Irrigation District (plaintiff in error) was "out of court," on account of its failure to appear in the action. The effect of a default is shown in the recent case of *Title Ins. & Trust Co. v. King etc. Co.*, 162 Cal. 44. The court said:

"A default is entered by the clerk or by the court at the instance of the adverse party. It is a proceeding against the delinquent party. A de-

fault cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered *is out of court* and not entitled to take any further steps in the cause affecting plaintiff's right of action."

Can it be said that a defendant who has permitted so many years to elapse after a default is entered against it, could nevertheless come into court by a special appearance and procure a dismissal of the action on the ground that the clerk did not *give* the summons to the marshal within one year after the date of filing the complaint, and at the same time admit that the clerk performed all of the duties imposed upon him by law?

And this in the absence of any showing that the district had no actual notice of the bringing of the action and the default. For anything that appears in the record the plaintiff in error may have had actual knowledge of the bringing of the action from the date of the filing of the complaint.

WHAT CONSTITUTES THE JUDGMENT ROLL.

Section 670 of the Code of Civil Procedure of California provides that in cases like these the judgment roll shall consist of (1) the summons with the affidavit, or proof of service; (2) the complaint with a memorandum endorsed thereon that the default of the defendant in not answering was entered; (3) a copy of the judgment.

Rule 16 of the Rules of Practice of the United States Circuit Court for the Ninth Circuit, Southern District

of California, provides that in cases like these the judgment roll shall consist of (1) the summons with the proof of service; (2) the complaint and a copy of the entry of the default of the defendant; (3) a copy of the judgment.

It will be seen that by this rule the judgment roll in this case is practically the same as that provided by the state practice.

The facts then, so far as material to this appeal, are shown in the foregoing statement of facts.

The plaintiff in error's contention is that because the return of service of summons by the marshal shows that the marshal received the summons more than a year after the complaint was filed that no summons was *issued* within a year, and that for this reason the judgment entered is a nullity—that is, absolutely void and not merely voidable.

SUFFICIENT UNDER LAWS OF CALIFORNIA.

There can be no question but that the issuance and service of the summons conformed to the California practice as established by the Code of Civil Procedure.

Section 405 of the Code of Civil Procedure provides that actions are commenced by filing the complaint.

Section 406 of the Code of Civil Procedure provides that a summons may be issued by the clerk at any time within one year thereafter.

Section 407 of the Code of Civil Procedure:

“SUMMONS, HOW ISSUED, DIRECTED, AND WHAT TO CONTAIN. The summons must be directed to the defendant, signed by the clerk, and *issued under the seal of the court*, and must contain:

1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed, etc.”

Section 581a of the Code of Civil Procedure provides that actions shall be dismissed unless summons shall have issued within one year and shall have been served and return made within three years after the commencement of the action.

Under the laws of California a summons is issued when the clerk has performed all of the acts which the law requires that he should perform, namely, when he, the clerk, has signed the summons and attached the seal of the court thereto.

COWELL v. STUART, 69 CAL. 525, COMPLETELY ANSWERS THE QUESTION RAISED BY PLAINTIFF IN ERROR.

In the case of Cowell v. Stuart, 69 Cal. 525, the question of issuance was directly decided by the court. The court spoke of the 6th day of November, 1882, as being the day that a summons was duly signed and sealed, and afterwards referred to this date by saying: “Within a year thereafter (the date of filing of the complaint) the summons was issued by the officer charged by law with the duty of issuing it, namely, the clerk.”

An examination of the transcript shows that summons was dated November 6, 1882, and that it was received by sheriffs as follows:

By the sheriff who served Stuart and Elder, December 20, 1882.

By the sheriff who served defendant Scheller, February 26, 1883;

And by the sheriff who served defendant Steele, January 19, 1883.

If a summons is only issued when delivered to the officer then in this case it was issued three times!

The facts are as follows:

The action was brought on promissory notes against five defendants. The complaint was filed November 9, 1881. On November 6, 1882, a summons was duly issued by the clerk. But, as stated by the court, "Neither *the summons* nor a copy of the complaint was served or placed in the hands of the sheriff for service *until after the expiration of one year from the time the complaint was filed*, nor was there any appearance within the year by either of the defendants."

On this account the issuance of the summons was attacked by the defendants. However, citing sections 405-6 of the Code of Civil Procedure, the court said:

"When the clerk in the present case delivered to the plaintiff's attorney a summons duly signed and sealed, he had performed every act it was essential for him to perform in the matter. The action was commenced by the filing of the complaint and within a year thereafter the summons was issued by the officer charged by the law with the duty of issuing it, namely, the clerk. * * * When the officer who is charged with the duty of issuing

the summons has done all that the law requires him to do, we can see no ground for holding that the summons is not issued."

We contend that, as Judge Wellborn says, "The issue raised at this hearing depends upon the law of California, Rev. St. U. S., Sec. 914," the defendant in error had a right to rely upon this decision of the Supreme Court of California, construing the laws of California relating to the issuance of summons and it would be contrary to all sense of justice if the Perris Irrigation District could permit a default to be taken against it and then nearly five years thereafter move to set it aside upon the ground that the summons was not given to the marshal until after one year from the date of the filing of the complaint, and at the same time conceding that the clerk performed his duty in *making out and attesting the summons within year*. In the examination of the records in this case, let us see what the clerk of the court did. He took the complaint in this action and filed it on the 29th day of December, 1904; thereafter, to-wit, on the 16th day of December, 1905, he prepared a summons, placed the seal of the court thereon, signed his name [see transcript, folio 20]. Now this is all he was required to do. The statute of California says:

"The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court and must contain * * *." (Sec. 407, C. C. P.)

There is not one word in this statute or any United States statute, that the clerk must deliver it to the

marshal. The *only* requirement, after the summons has been prepared by the clerk, is that it must be served within three years from the date of the filing of the complaint. The records of the clerk's office show the date of the issuance of the summons. Inasmuch as the law gives three years to serve the summons, what possible difference can it make to a defendant where the summons is lodged from the time that it is attested by the clerk and the time it is actually served?

Shall a judgment for \$11,330.30 fall because the clerk of the court did not perform some act *not required of him*? And at the instance of a defendant who made no objection until nearly five years had elapsed after the entry of its default.

The plaintiff in error is in a very awkward position to complain of laches. It does not explain or attempt to explain its laches of nearly five years in allowing a default to remain undisturbed, and makes no showing that it did not know of the entry of the default.

On page 11 of the brief of the plaintiff in error, we find the following:

“Moreover, it is the policy of the courts, that all matters before them should be expedited in order that their records may not be encumbered with dormant and stale matters.”

And yet the records in this case show that plaintiff in error was served with summons on the 9th day of July, 1907, and its default was entered on the 12th day of September, 1907, and this default remained *unquestioned* by the Perris Irrigation District for *nearly five years*. Why didn't the Perris Irrigation District help the courts by bringing an early hearing on its motion

to set aside the summons, if it is "the policy of the courts that all matters before them should be expedited"? After defaults are entered and allowed to remain undisturbed for so many years, are they then "dormant and stale matters," or when do they become such?

RULE 7 OF THE UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF CALIFORNIA.

"RULE 7. DISMISSAL OF ACTIONS—FAILURE TO PROSECUTE—Whenever a complainant shall fail to have process issued upon any complaint hereafter filed in this court, within one year after the filing thereof against any defendant named therein, who has not voluntarily made a general appearance in the action, or who shall fail to make a *bona fide* effort to procure service of summons upon such defendant within sixty days after the issuing thereof, such defendant may, upon due notice to the complainant, have said complaint dismissed for want of prosecution; but this rule shall not affect the right of the court to dismiss actions for want of prosecution in other proper cases."

But here the Perris Irrigation District was "out of court" and could give no notice.

So far as we know no statute has been enacted by the congress of the United States requiring a summons in actions like these, to be issued within one year, or requiring its service within any given time. Plaintiff in error must, therefore, rely upon the above rule of court, and upon the requirement that all service of process in United States courts shall be by the marshal.

We contend that a judgment, to be absolutely void upon the face of the record, that is upon the

judgment roll, must show a failure to comply with some *positive enactment of the legislative body, or some fundamental law*, otherwise, if the judgment were sued upon in another court or in another state, the question of its validity or invalidity would depend upon proof of the rules of this court. In other words, the defect would not appear upon the face of the record without the proof of other matters.

Again, we contend that Rule 7 necessarily contemplates an application to the court to dismiss the action upon notice for want of prosecution. This being so it is an application to the jurisdiction of the court. This rule does not go to the extent of section 581a of the Code of Civil Procedure of California, which provides that if summons is not served and return made within three years, no further proceeding shall be had, and which has been held to deprive the courts of California of jurisdiction to proceed in such cases. But it is necessarily an application to exercise its jurisdiction, and if so the decision of the court made in the exercise of its jurisdiction is subject to be reviewed upon appeal, and does not make a judgment void upon the face of the record.

Section 914 of the Revised Statutes provides:

“The practice, pleadings and forms and modes of proceedings in civil cases other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the courts of record of the state within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*”

First: Does Rule 7 of the Circuit Court of the Ninth Circuit, Southern District of California, require the dismissal of these actions, and does said Rule 7 apply to the service of summons to the exclusion of sections 406, 581 and 581a of the Code of Civil Procedure of the state of California?

At the time this action was brought the Code of Civil Procedure of California provided that an action was commenced by the filing of the complaint, that a summons must issue within a year thereafter and that it must be served, returned and filed within three years from the time the complaint was filed. In this case the defendant in error is strictly within the rules prescribed by the Code of Civil Procedure of California.

We believe that we are strictly within said Rule 7 of the Circuit Court in the issuing of process. We also claim that it is not the intent of this rule to permit a defendant to come in many years after service and move to dismiss the action because the service was not made within sixty days. Certainly this rule does not supersede the above direct provision of the California Code. We believe also that the true intent of the rule is to give the defendant a summary remedy by applying for dismissal and prevent a plaintiff from filing a complaint and keeping an action alive against a defendant indefinitely. *We claim it was never intended to apply to cases like those before the court where the plaintiffs have for so many years been actively engaged in strenuous efforts to bring the cases to a final hearing and determination.*

SOME CALIFORNIA CASES.

In the case of Churchill v. Woodworth, 84 Pac. 155 (Cal.), the court spoke of the issuance of the summons, saying: "On November 12, 1902, summons was issued upon the original complaint."

We made an examination of the transcript at the Los Angeles County Law Library and found that the summons was *dated* November 12, 1902, and was received by the sheriff December 25, 1902.

It will be seen that the court always speaks of the date of the summons as being the issuance of the summons.

In Modoc v. Superior Court, 128 Cal. 255, the court said:

"The summons was issued upon the complaint September 4, 1897, and a copy of the complaint was served upon the defendant August 7, 1899."

An examination of the transcript shows that the summons was *dated* September 4, 1897, but that it was not received by the sheriff until August 3, 1899—*nearly two years after its issuance.*

In the case of Sharpstein v. Eels, 132 Cal. 507, the court said:

"The summons was issued October 26, 1895, but was not served until February 6, nor returned until February 17, 1900."

An examination of the transcript shows that the summons was dated October 26, 1895, but that it was not received by the sheriff until January 29, 1900. In

the briefs the parties all seem to concede that the date of issuance was the date of the summons.

In *Kennedy v. Mulligan*, 136 Cal. 556, the complaint was filed May 29, 1896. The summons was dated May 22, 1897. See transcript S. F. No. 2016. The service was made March 24, 1898.

The Supreme Court said:

“The summons *was issued within the year* and served within less than a year thereafter. No injury appears to have resulted to defendant, nor was he prevented by the delay from paying the judgment.”

Fitman on Code Summons says:

“By issuing a summons we are not to be understood as meaning its delivery to the sheriff or other proper officer for service. As we understand it, a summons is issued when it is *prepared, signed by the clerk, and sealed with the court seal, and is in all respects complete for delivery to a proper officer for service.*” (Page 8.)

In *Alderman on Judicial Writ and Process* the author says, in speaking of the date of the summons: “Such date is *prima facie* evidence of the date when it is issued.”

In re James, 99 Cal. 374: A collateral attack upon a decree of divorce rendered by the Circuit Court of Missouri upon constructive service of process. This decree of the Circuit Court of Missouri was, by the Supreme Court of California, held to be good as against a collateral attack. The contention was that no process was ever issued by the Missouri court for the reason that the order which constitutes the process *was not signed by the clerk.*

CASES OUTSIDE OF CALIFORNIA.

We particularly call attention to:

Webster v. Sharpe, 116 N. C. 466, and

Currie v. Hawkins, 118 N. C. 593.

In the Webster case the court says:

“The presumption is that it issued at the time it bears date, and the burden is on defendant to show that it did not.”

In the case at bar the plaintiff in error does not attempt to assume this burden and has made no showing whatever.

In the Currie case the court says:

“There remains to be disposed of the plea of the statute of limitations. The date of the issue of a summons when the matter is in dispute, depends upon the facts connected therewith. The presumption is in favor of its having been issued at the time it bears date. The defendant has introduced no testimony in this case tending to show the issuing of the summons was in fact after the date mentioned therein, and he relied *simply upon the fact that the sheriff's return showed that it was received two months and a half after its date, to prove that it was not issued on the day of its date. This fact alone does not rebut the presumption* that the summons was issued at the time of its date.”

UNITED STATES STATUTES AND CASES.

Section 911 of the Revised Statutes provides:

“All writs and process issuing from the courts of the *United States* shall be *under the seal of the court from which they issue* and shall be signed by the clerk thereof.”

Section 912 provides:

“All process issued from the courts of the United States shall bear teste from *the date of such issue.*”

If summons is not issued until given to the marshal then it must be given to him the day it is dated to comply with this section.

IF COUNSEL'S CONTENTION BE UPHELD THEN THE JUDGMENTS IN NUMBERLESS CASES WOULD BE INVALIDATED BECAUSE THE DATE OF THE TESTE AND THE DATE OF THE RECEIPT OF THE PROCESS BY THE MARSHAL WOULD HAVE TO BE THE SAME TO AVOID ATTACK.

We believe that in the federal courts of the United States there are hundreds of adjudicated cases which, if the contention of the plaintiff in error is correct, could be opened any time and motions made to set aside the judgments upon the ground that while the date of the summons is attested by the clerk within one year of the filing of the complaint, nevertheless, its actual delivery to the marshal was after the expiration of the year.

If such be the law judgments of great import throughout the United States, rendered years ago and since acted upon, are void on their face and can be and are now subject to collateral attack.

In construing section 911 of the Revised Statutes, the court in *Leas v. Merriam*, 132 Fed. 512, said:

“I think section 911 means *no more* than that when a writ of process *issues* from a federal court it *must be signed by the clerk and shall be authenticated in the manner therein set out.*”

No duty is imposed on the clerk to *also* deliver it to the marshal before he can say he has issued it.

In *Jewett v. Garrett*, Circuit Court, D., New Jersey, 47 Fed. Rep. 625, the court said:

“The statute governing the issue of writs and process from the courts of the United States requires that such writs and process shall be under the seal of the court, and shall be signed by the clerk thereof (Rev. St. U. S., Sec. 911); and there is a further requirement that all process must bear teste from the day of its issue (*Id.*, Sec. 912). Other than in these necessary particulars, neither the form of the writ or process, nor its contents, *nor the manner of its delivery to the marshal for service*, nor its formal drafting, *is sought to be controlled, or affected by any legislation of congress*, further than to ordain generally that the writ shall, as to those particulars, as far as possible, harmonize with, and be similar to, the writs and processes obtaining under the code of procedure of the state in which the court has jurisdiction.”

In the case of *Van Dresser v. Oregon etc. Company*, 48 Fed. 205, the court said:

“The laws of the state providing for the service of process of the state courts in actions at law furnish the rules for procedure in such cases in this court, so that whatever would be lawful service of process to bring a party into court if the action were in court of competent jurisdiction under the *state* government, is lawful and sufficient for the purpose in actions commenced in this court.”

CASES CITED BY PLAINTIFF IN ERROR.

We have examined the cases referred to in the brief of plaintiff in error, but they are not applicable to the

case now before the court. Most of the cases arise in jurisdictions where the summons or writ is made out by the attorney for the plaintiff and where it is held that an action is *commenced when the summons is issued* and where it is important to determine when an action is commenced so as to save the statute of limitations. In California an action is commenced when a complaint is filed. These cases turn upon the question of intention. If it is shown that there was a *bona fide* definite intention to bring the action at the time the writ or summons was made out and signed by the attorneys for plaintiff or by the clerk, the writ is considered issued. The real point in these cases is that a plaintiff cannot sue out a writ or have a summons issued and keep his claim alive so as to bar the statute of limitations, or, in other words, so as to commence an action until the proceedings have passed the place where the plaintiff or his attorney can suppress them and prevent any suit being commenced. These cases cannot apply to the specifications of error now before the court because this action was commenced by the *filing of the complaint. It is so provided by the rule of the Circuit Court and by the statutes of California.* The following are all of the cases cited by defendant and they fully bear out our position and are not in point upon the matters now before the court.

Hekla Insurance Co. v. Schroeder, 9 Ill. App.
472.

This case holds that an action is not commenced until summons is sued out, and that summons is not considered legally sued out until it is delivered to the

sheriff with the authority to make service, or it is transmitted to him for that purpose. The mere making out, signing and sealing the summons by the clerk and delivering to plaintiff or his attorney, is not the commencement of any suit so as to save the bar of the statute of limitations.

We understand, however, that in Illinois a summons can precede the filing of the complaint or declaration, so that it is within the power of plaintiff or his attorney *to suppress* the action at any time prior to the delivery of the summons to the sheriff with authority to serve it.

Pease v. Richie, 132 Ill. 638, 24 N. E. 433.

The statute provides that a judgment of a court of record shall be a lien on the real property of the person against whom it is obtained, in the county for which the court is held, for seven years from the time it is rendered; but provided, that when execution is not issued on a judgment within one year from the time it becomes a lien, it shall thereafter cease to be a lien.

* * * The clerk made out an execution within the year; but it was never delivered to the sheriff to execute, and when found, an endorsement was found on the back of the execution, "Not called for."

Held not a compliance with the statute.

The statute requires something more than the mere writing of an execution by the clerk and placing it among the files in his office.

Mills v. Corbitt, 8 How. Pr. 500.

Statute provided that an attachment could issue at any time after summons was issued, and it was held

that if the summons was made out and signed by the attorney, with the actual intention of having the same served, it was not necessary that it be delivered to the sheriff prior to the issuing of the attachment. We think the case turns on the question of intention.

Ross v. Luther, 4 Cowan (N. Y.) 158.

Action of debt against the sheriff for escape of prisoner from the jail limits.

Writ had been filled up sometime previous and left with clerk in the office of the plaintiff's attorney to be issued when he could ascertain that prisoner was off the limits. There was not an absolute intention that the writ should be delivered to the coroner in the first instance. It was committed to the clerk of the attorney to exercise his discretion. This discretion cannot be committed to an agent or messenger, and the suit was not commenced until the actual delivery to the coroner.

White v. Johnson, 27 Ore. 282, 40 Pac. 511.

The real question decided in this case is that no proper summons was issued and served upon the executrix of a defendant who had died after the filing of the complaint.

The court, however, takes up the question of the proper issuance of an attachment, and holds that under the laws of Oregon, which provide that an attachment cannot issue until after a summons is issued, that summons is not issued until delivery to the sheriff. It will be noticed, however, that in Oregon a summons is made out and signed by the plaintiff or his attorney and *not by the clerk*. We claim this case only goes so

far as to hold that the proof of intention to issue summons is established by its delivery to the sheriff, and falls within the same rule as the other cases cited by defendant, that the issuance of the summons is a question of intention. It may, however, be construed as going further in holding what can be considered evidence of such intention.

CONCLUSION.

We contend:

(a) That counsel for plaintiff in error has failed to establish the invalidity of the judgment.

(b) That the defendant in error complied with the statutes of California in causing the summons to be issued by the clerk December 28th, 1906—within one year from the date of the filing of the complaint (December 28th, 1905), and caused the same to be served July 7th, 1907, within three years from the date of filing the complaint.

(c) That the court below properly refused to set aside the default of the district entered September 12, 1907, in view of the fact that the application therefor was not made until June, 1912—nearly five years after the entry of the default, and no showing has been made that such refusal was an abuse of discretion.

That plaintiff in error has not shown that Judge Wellborn was in error in rendering the following decision:

“The issue raised at this hearing depends upon the law of California. (Revised Statutes of the United States, section 914.)

"The Supreme Court of said state, construing sections 405 and 406 of the Code of Civil Procedure, has held, that a summons is issued when the officer charged with its issuance has done all that the law requires him to do in reference thereto. (*Cowell v. Stewart et al.*, 69 Cal. 525.)

"The doctrine of this case, so far from being contrary to is impliedly sanctioned in *Reynolds v. Page*, 35 Cal. 296, 300, where the court says:

"The issuing of the summons intended is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting a valid service. * * * And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal.'

"The other California cases cited in defendant's brief do not relate to the point now under consideration; nor does Rule 7 of this court in any way conflict with the decision in *Cowell v. Stewart*, *supra*, and said decision, I hold, is the law applicable to the case at bar.

"This conclusion renders it unnecessary for me to review the other authorities cited in the briefs of the respective parties."

Respectfully submitted,

WILLIAM M. HIATT,

OSCAR C. MUELLER,

Attorneys for Defendants in Error.

Ag
O

71

